(20,669.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 282.

WATERS PIERCE OIL COMPANY, PLAINTIFF IN ERROR,

vs.

ALBERT B. DESELMS.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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a *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Albert B. Deselms, Messrs. Lawrence & Huston, and Messrs. Devereaux & Hilberth, his attorneys:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States of America to be held at the City of Washington in the District of Columbia, within thirty days from the date of this writ pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of Oklahoma, wherein the Waters Pierce Oil Company, is plaintiff in error, and you, said Albert B. Deselms, are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 19th day of March, A. D. 1907.

C. F. IRWIN,
Associate Justice of the Territory of Oklahoma.

Attest:
BENJ. F. HEGLER,
Clerk of the Supr-me Court of the Territory of Oklahoma,
By JESSIE PARDOE, *Deputy.*

[Seal Supreme Court, Territory of Oklahoma.]

We, the undersigned attorneys for the above named defendant in error hereby acknowledge due service in behalf of the said defendant in error upon us, this 19th day of March, 1907.

DEVEREAUX & HILBERTH,
Attorneys for Defendant in Error.

b [Endorsed:] Waters-Pierce Oil Company, Plaintiff in error, *vs.* Albert B. Deselms, Defendant in error. Citation and acknowledgment — service thereof. Filed March 19, 1907. Benj. F. Hegler, Clerk Supreme Court, By Jessie Pardoe, Deputy.

1 In the Supreme Court of the Territory of Oklahoma.

No. 1819.

WATERS PIERCE OIL COMPANY, Plaintiff in Error,
vs.
ALBERT B. DESELMS, Defendant in Error.

Comes now the above named plaintiff in error and complains that in the record and proceedings had in said cause and also in the

rendition of the judgment in the above entitled cause in said Supreme Court of the Territory of Oklahoma at the January Term thereof, A. D. 1907, against this said plaintiff in error, on the 13th day of February, A. D. 1907, affirming the judgment of the District Court of the County of Logan and Territory of Oklahoma, rendered in said cause, manifest error hath happened to the great damage of this plaintiff in error, the Waters Pierce Oil Company.

Wherefore, said plaintiff in error prays for the allowance of a writ of error and for an order fixing the amount of bond for a supersedeas in said cause and for such other orders and process as may cause the same to be corrected by the Supreme Court of the United States of America.

Dated this 18th day of March A. D. 1907.

WATERS PIERCE OIL COMPANY,
Plaintiff in Error,
By SHARTELL, KEATON & WELLS,
JOHN W. SHARTEL, *Its Attorneys.*

2 The writ of error prayed for in the foregoing petition is hereby allowed and the bond fixed for supersedeas shall be given within ten (10) days from this date in the sum of $30,000.00, conditioned as required by law.

C. F. IRWIN,
Associate Justice Supreme Court of the Territory of Oklahoma.

Dated March 19th, 1907.

Attest:

BENJ. F. HEGLER,
Clerk Supreme Court,
[SEAL.] By JESSIE PARDOE, *Deputy.*

(Endorsed:) No. 1819—In the Supreme Court of Oklahoma Territory—Waters Pierce Oil Company, Plaintiff in error, *vs.* Albert B. Deselms, Defendant in error—Petition for Writ of Error—Shartel, Keaton & Wells, Oklahoma City, Okla., Attorneys for W. P. Oil Co.—Filed March 19, 1907, Benj. F. Hegler, Clerk Supreme Court—By Jessie Pardoe, Deputy.

3 In the Supreme Court of the Territory of Oklahoma.

WATERS PIERCE OIL COMPANY, Plaintiff in Error,
vs.
ALBERT B. DESELMS, Defendant in Error.

Assignment of Errors.

Comes now the plaintiff in error, the Waters Pierce Oil Company, and hereby alleges that the above entitled court in the hearing of said cause in the affirmance of the judgment of the court below

therein, on the 13th day of February, 1907, committed manifest error to the prejudice of the said plaintiff in error, the Waters Pierce Oil Company, in the following particulars and each of them, to-wit:

1st. The court erred in affirming the action of the District Court of Logan county, Territory of Oklahoma, in overruling the objection of this plaintiff in error to the introduction of any evidence under the petition of the defendant in error, plaintiff in the court below, because each count of said petition failed to state facts sufficient to constitute a cause of action in favor of the defendant in error and against this plaintiff in error.

2nd. The court erred in affirming the action of the court below, over the objection and exception of the plaintiff in error, in admitting in evidence a certain letter addressed to N. M. Carter by J. W. Wagnon, addressed at Denison, Texas, 1-20-1903.

4 3rd. The court erred in affirming the action of the court below in overruling the demurrer of the plaintiff in error to the evidence introduced by the defendant in error in the court below, because the same fails to prove facts sufficient to constitute any cause of action in favor of the defendant in error and against this plaintiff in error.

4th. The court erred in affirming the action of the court below in refusing to grant the request by the plaintiff in error for a peremptory instruction at the close of the trial in the court below.

5th. The court erred in affirming the action of the court below in giving Instruction No. 4 to the jury, which instruction is in the words and figures following, to-wit:

"By the laws of this Territory, dealers in illuminating oils and gasolines are prohibited from selling any such oils or gasolines until the same shall have been inspected by the Territorial Coal Oil Inspector and have been pronounced of a quality permitted to be sold, and any person violating such law is made liable for a penalty, in a criminal prosecution. All illuminating oils or fluids that flash at a less temperature than 120 degrees Fahrenheit, and have not a specific gravity of not less than 46 degrees Baume, that is, all oils that fail to stand both tests, are required to be "rejected," and all gasolines used in vapor stoves and gasoline lamps shall have a specific gravity of not less than 70 degrees Baume at a temperature of 60 degrees Fahrenheit. Oils and gasolines which do not come up to the tests prescribed by our laws are not permitted to be sold for domestic purposes."

6th. The court erred in affirming the action of the court below in giving Instruction No. 5 to the jury, which instruction is in the words and figures following, to-wit:

"If you find from a preponderance of the evidence that the defendant, Waters Pierce Oil Company, knowingly sold a mixture of coal oil and gasoline to Powers and Deselms, to be by them resold as coal oil, in the usual and ordinary manner as retail mer-

5 chants, and that said mixture was of a highly inflammable, explosive and dangerous character when used with reasonable and ordinary caution, for the usual and ordinary purposes for which

coal oil is usually and generally used, and that the plaintiff procured a portion of said mixture from Powers and Deselms to be used for coal oil and carried the same to his home in a coal oil can, and that while handling the same with ordinary care and caution, in such manner as an ordinarily prudent person ordinarily uses or handles the same and for the purposes for which coal oil is usually, generally and ordinarily used, and that while so handling the same, said mixture exploded or caused an explosion which killed and burned the plaintiff's children, you will then return your verdict in favor of the plaintiff and assess his damages at such sum as you shall determine to be reasonably commensurate."

7th. The court erred in affirming the action of the court below in giving Instruction No. 6 to the jury, which instruction is in the words and figures following, to-wit:

"One of the material questions for you to determine is, whether or not the fluid sold in this instance was reasonably safe for the purposes for which it was sold, or whether it was dangerous to be used as coal oil. If the defendant sold an uninspected or rejected fluid which was more dangerous than the quality prescribed by law, and the plaintiff or his wife had no knowledge or notice of its dangerous quality, and while using it with ordinary care and caution such as ordinarily prudent persons would exercise under similar circumstances and for the uses and purposes for which coal oil is usually and generally intended and used, such fluid exploded or took fire and caused the death of plaintiff's children, then the defendant is liable in damages."

8th. The court erred in affirming the action of the court below in giving Instruction No. 7 to the jury, which instruction is in the words and figures following, to-wit:

"Another important and material question for your determination is whether or not the use of the fluid sold in any manner caused the accident complained of and, if it caused it, the manner of causing it. You cannot base your determination upon mere supposition or conjecture, but you are permitted to find such facts proven as are the rational and reasonable inferences from other facts proven. If you find that the wife of the plaintiff was at the time of the accident using the oil to kindle or aid in starting a fire in the stove, you will then determine whether the making use of coal oil to*m* kindle or start fires is a usage or custom so general and universal as to be a part of the general knowledge and experience of persons of average intelligence and experience, and if the defendant at the time it sold said oil had reason to believe that it would be used for such pur-
6 poses. If it is not the general and usual custom to use coal oil for kindling fires, and the defendant when it sold the fluid to Powers & Deselms to be resold, had no reason to believe it would be sold for such purposes, and the use of it for such purpose was the cause of the accident, then the plaintiff is not entitled to recover."

9th. That the court erred in affirming the action of the court below in refusing to give Instruction No. 5 requested by the plaintiff in error in the court below, which instruction is in the words and figures following, to-wit:

"If you believe from the evidence in this case that the defendant sold to the firm of retail dealers three barrels of a mixture of oil and gasoline and shipped the same to such firm of retail dealers in packages which were not branded by the public inspector of oils, or any of his deputies, as approved standard oil, and such oil was a mixture unsafe and dangerous in its character and that an inspection of such oil by the public inspector previous to its being sold at retail by the said firm of retailers would have disclosed its dangerous character and resulted in the same being branded rejected, you are then instructed that said firm of retailers would be guilty of a criminal violation of the law in selling such oil for illuminating purposes, and, if you believe from the evidence but for such failure to inspect such oil or have the same inspected by the said firm of retail dealers the accident in controversy in this case would not have happened, it will be your duty to find in favor of the defendant in this case."

10th. The court erred in affirming the action of the court below in refusing to give Instruction No. 11 requested by the plaintiff in error in the court below, which instruction is in the words and figures following, to-wit:

"Even if you find the mixture of oil and gasoline in controversy in this case to have been a dangerous substance and to have been negligently put on the market by the defendant, unless the plaintiff has satisfied you by a preponderance of the evidence that the defendant sold and marketed the oil with the expectation that it would be retailed and used for other than illuminating purposes, and that the defendant intended in placing it on the market that it should be so used and the accident resulted from making a different or other use of the oil and by using the same for fuel or kindling fires in stoves, it will be your duty to find for the defendant in the case."

11th. The court erred in affirming the action of the court below in modifying request No. 14 of the plaintiff in error in the
7 court below, which instruction so requested was in words and figures as follows, to-wit:

"In determining the amount of your verdict for the plaintiff, if you find for such plaintiff, you should not take into consideration the pain suffered by the deceased or the wounded feelings of the father or other surviving relatives, but your verdict must be limited to such amount, if any, as you believe the plaintiff has suffered financially by reason of the death of his children. In other words, the recovery, if any, is to be a pecuniary compensation for a pecuniary loss, and such finding of loss must be based upon the evidence introduced in the case."

To which the court below added:

"The amount of damages cannot be fixed by the evidence, but must be the result of your own judgments."

12th. The court erred in sustaining the action of the court below in overruling the motion for a new trial filed by the plaintiff in error in the court below.

13th. The court erred in affirming the judgment rendered in favor of the defendant in error and against plaintiff in error for the re-

covery of fourteen thousand five hundred ($14,500.00) dollars, in the court below.

14th. The court erred in affirming the action of the court below in sustaining the amount of damages awarded by the jury in said cause, the same being excessive.

Wherefore, this plaintiff in error prays that the judgment of said court be reversed and remanded for further proceedings according to law.

WATERS PIERCE OIL COMPANY,
Plaintiff in Error,
By SHARTEL, KEATON & WELLS,
JOHN W. SHARTEL, *Its Attorneys.*

[Endorsed:] No. 1819. In the Supreme Court of Oklahoma Territory. Waters Pierce Oil Co., Plaintiff in error, *vs.* Albert B. Deselms, Defendant in error. Assignment of Errors. Filed March 19, 1907. Benj. F. Hegler, Clerk Supreme Court. By Jessie Pardoe, Deputy. Shartel, Keaton & Wells, Oklahoma City, Okla., Attorneys for W. P. Oil Co.

8 *Writ of Error.*

The President of the United States, Justice and Clerk of the Supreme Court of the Territory of Oklahoma, Greeting:

Because in the record and proceedings as also in the rendition of the judgment in a plea which is in the said Supreme Court of the Territory of Oklahoma before you, or some of you, between the Waters Pierce Oil Company, as plaintiff in error, and Albert B. Deselms, as defendant in error, manifest error hath happened to the great damage of the said Waters Pierce Oil Company, as by its complaint appears, we being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States of America, together with this writ, so that you have the same at the City of Washington, on thr 18th day of April, next, in the said Supreme Court to be then and there held, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this nineteenth day of March, in the year of our Lord one thousand nine hundred and seven.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.
By JESSIE PARDOE, *Deputy.*

Allowed by
C. F. IRWIN,
Associate Justice of the Supreme Court of the Territory of Oklahoma.

(Endorsed:) Waters-Pierce Oil Company, Plaintiff in error, *vs.* Albert B. Deselms, Defendant in error. Writ of Error. Filed March 19, 1907. Benj. F. Hegler, Clerk Supreme Court, By Jessie Pardoe, Deputy.

9 Know all men by these presents:

That we, Waters-Pierce Oil Co., a corporation, as principal and American Surety Co., of New York, a corporation, as surety, are held and firmly bound unto Albert B. Deselms, in the full and just sum of thirty thousand ($30,000) dollars, to be paid to the said Albert B. Deselms, his certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bond ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 28th day of March, in the year of our Lord One thousand, nine hundred and seven.

Whereas, lately in the Supreme Court of the Territory of Oklahoma, in a suit depending in said court, between Waters-Pierce Oil Co., as plaintiff in error, and Albert B. Deselms, as defendant in error, a judgment was affirmed against the said Waters-Pierce Oil Co., and the said Waters-Pierce Oil Co., having obtained a writ of error and filed a copy thereof, in the Clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Albert B. Deselms, citing and admonishing him to be and appear at the session of the Supreme Court of the United States, to be holden at the City of Washington, within thirty days from the date of said citation:

Now the condition of the above obligation in such that if the said Waters-Pierce Oil Co., shall prosecute said writ of error to effect, and answer all damages and costs, if it fail to make its said plea good, then the above obligation to be void; else to remain in full force and virtue.

WATERS-PIERCE OIL CO.,
By SHARTEL, KEATON & WELLS,
Its Attorneys.

10 AMERICAN SURETY COMPANY
OF NEW YORK,
By JOHN THREADGILL,
Resident Vice President.

Attest:
HERMAN J. ROLEKE,
Resident Assistant Secretary.

Sealed and Delivered in the presence of
LOREN D. FERGUSON.
GEO. G. BARNES.
[SEAL.]

Approved by me this 29th day of March, 1907.
CLINTON F. IRWIN,
Justice of the Supreme Court of Oklahoma.

11 *Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.*

The first quarterly meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Wednesday, January 16, 1907, at 12 o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Wednesday, December 19, 1906, for the purpose of nominating officers of the Company, * * * for the ensuing year, beg leave to report as follows:

"We nominate for * * *

Place.	Resident vice-presidents.	Resident assistant secretaries.
Oklahoma City, Okla....	Werner Opes	Werner Opes
	John Threadgill ...	Wm. F. Wilson
	Wm. F. Wilson....	Howard E. Elder
		Herman J. Roleke.

Whereupon, it was * * *

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present for the officers, members of the Executive Committee, and for the members of the Committee on Accounts, as recommended by the Nominating Committee for the ensuing year; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year.

* * * * * * *

12 "The following resolution was adopted:

"Resolved, that the Resident Vice-Presidents be and they hereby are, and each of them is hereby authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK, *County of New York, ss:*

I, F. J. Parry, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with

the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this Jan. 29, 1907.

[SEAL.]

F. J. PARRY,
Assistant Secretary.

13

American Surety Company of New York.

Incorporated April 14, 1884.

General Offices, 100 Broadway.

Financial Statement, Dec. 31, 1906.

Resources.

Real Estate	Home Office unencumbered	$3,000,000.00	
	N. Y. City Water Front, unencumbered, purchased and leased on 8 % basis	148,587.64	
			$3,148,587.64
Stocks and Bonds			2,587,606.69
Cash in Banks and Offices			654,442.57
Premiums in course of Collection			172,354.50
Accrued interest and Rents			19,348.67
			$6,582,340.07

Liabilities.

Capital Stock	$2,500,000.00
Surplus	2,503,010.05
Re-serve for re-insurance	991,511.26
Reserve for Contingent Claims	573,009.58
Accounts payable, not due	14,809.18
	$6,582,340.07

Endorsed on the back.

STATE OF NEW YORK, *County of New York, ss:*

Henry Tofts, being duly sworn, says: That he is an Assistant Secretary of the American Surety Company of New York; that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the state of New York, and has duly complied with all the require-

ments of the laws of said state applicable to said Company, and is duly qualified to act as surety under such laws. That said
14 company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon;" that the within is a true copy of the last statement of the assets and liabilities of said company as rendered pursuant to section 4 of said Act of Congress; that said American Surety Company of New York is worth more than $5,000,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

HENRY TOFTS.

Subscribed and sworn to before me this 9th day of February, 1907.

[SEAL.] T. J. MANNING,
Notary Public, New York County.

Endorsed: No. 1819. In the Supreme Court of Oklahoma Territory. The Waters-Pierce Oil Co., Plaintiff in error, *vs.* Albert B. Deselms, Defendant in error. Bond. Filed March 30, 1907, Benj. F. Hegler, Clerk Supreme Court, by Jessie Pardoe, Deputy. Shartel, Keaton & Wells, Oklahoma City, Okla., Attorneys for ——.

15 In the Supreme Court of the Territory of Oklahoma.

1819.

WATERS PIERCE OIL COMPANY, Plaintiff in Error,
vs.
ALBERT B. DESELMS, Defendant in Error.

Petition in Error.

Comes now the plaintiff in error, Waters Pierce Oil Company, and for cause of action in error alleges and avers that on the 6th day of April, 1905, in a cause pending in the District Court of the county of Logan, Territory of Oklahoma, where the defendant in error, Albert B. Deselms, was plaintiff and this plaintiff in error, the Waters Pierce Oil Company, was defendant, the said plaintiff in said court below by the consideration of said court recovered a judgment against the defendant in the court below, this plaintiff in error, for the sum of fourteen thousand five hundred ($14,500.00) Dollars, together with the costs of the action in that behalf expended; and the said judgment, together with all the pleadings, process, proceedings, evidence, rulings and proceedings of every kind and character taken and had by the court in said cause wherein said judgment was rendered are all preserved in a case duly made, served, signed and settled, which said case made is hereto attached, marked Exhibit "A" and hereby made a part of this petition in error.

This plaintiff in error alleges that in the proceedings resulting in said judgment there is manifest error to the substantial prejudice of the rights of this plaintiff in error and in the following respects, to wit:

16 *First.* The court erred in overruling the objection of the defendant in the court below to the introduction of any evidence under the petition of the plaintiff made separate to each count thereof at the commencement of the introduction of evidence on behalf of the plaintiff in chief; which rulings were separately excepted to by the defendant.

Second. The court erred in admitting in evidence a certain letter from J. W. Wagnon, assistant manager of the defendant in the court below, to N. M. Carter, agent of defendant in the court below, at Guthrie, Oklahoma.

Third. The court erred in admitting other incompetent, improper and illegal evidence not tending to support any issue in said cause.

Fourth. The court erred in excluding certain proper, legal and competent evidence offered by the defendant in said cause in the court below.

Fifth. The Court erred in giving certain incompetent and improper instructions to the jury in said cause.

Sixth. The court erred in refusing to give certain competent instructions requested to be given by the defendant in the court below.

Seventh. The court erred in overruling the demurrer of defendant to the plaintiff's evidence in chief in the court below.

Eighth. The court erred in overruling the motion made by the defendant in the court below for a new trial.

Ninth. The court erred in rendering judgment on the verdict of the jury in said cause.

To each of which rulings and orders complained of the defendant duly excepted, as shown by the said case made.

17 Wherefore, the plaintiff in error prays that this court will examine the alleged errors, reverse said cause and remand the same for a new trial, and for such other relief as to the court may seem right and just.

SHARTEL, KEATON & WELLS,
Attorneys for Plaintiff in Error.

Filed Nov. 2, 1905,
J. H. NORRIS,
Clerk District Court.

Filed Nov. 2, 1905,
BENJ. F. HEGLER,
Clerk Supreme Court.

We hereby waive the issuance of summons in error and enter def't in error's appearance in the Supreme Court this 2 day of Nov. 1905.

LAWRENCE & HUSTON,
STRANG & DEVEREUX,
Att'ys for Def't in Error.

Filed Nov. 2, 1905,
BENJ. F. HEGLER,
Clerk Supreme Court.

18 In the District Court of Logan County, Oklahoma Territory.

ALBERT B. DESELMS, Plaintiff,
vs.
WATERS PIERCE OIL CO., Defendant.

Case-made.

Be it remembered, that heretofore, to wit: on the 25th day of March, 1903, the plaintiff above named, commenced his action against the above named defendant, by filing in the office of the clerk of the district court of Logan County, Oklahoma, his petition, and precipe for summons, and causing summons to issue thereon directed to the defendant, which said petition so filed, together with the endorsements thereon, is in the words and figures following, to wit:

19 In the District Court of Logan County, Oklahoma Territory.

ALBERT B. DESELMS, Plaintiff,
vs.
WATERS PIERCE OIL CO., Defendant.

Petition.

The plaintiff avers that he is the surviving husband and next of kin to one Rosalie Deselms, deceased; that prior to, and at the time of her death, the said Rosalie Deselms was a resident of Logan County, Oklahoma Territory and that no personal representative of the said Rosalie Deselms is or has been appointed, and that there is no *widow* of said deceased Rosalie Deselms.

Plaintiff avers that the defendant is a corporation incorporated and existing under the laws of the State of Missouri.

That the said defendant is and was at the times hereinafter mentioned engaged in the business of handling and selling at wholesale coal oil and gasoline in Oklahoma, Texas, and other states and that in the operation and carrying on of its business the said defendant had and maintained an agency at the city of Guthrie in Oklahoma Territory and had and maintained thereat tanks

for the storage of oils, different tanks being provided for coal oil than those used for the storage of gasoline.

Plaintiff avers that on or about the — day of January 1903, the said defendant carelessly and negligently mixed and commingled a large quantity of gasoline together with a large quantity of coal oil and immediately and on the same day after said fluids has been so carelessly and negligently mixed and commingled together as aforesaid the said defendant through its agents and employés discovered, and was fully informed and had knowledge of the fact that said fluids had been mixed and commingled together as aforesaid in one of the tanks of said defendant located at its agency
20 at the said city of Guthrie; that this mixture of coal oil and gasoline was highly inflammable, liable to explosion and particularly dangerous to be used as coal oil, which defendant well knew.

That the said defendant knowing and being fully informed that said coal oil and gasoline had been mixed together did thereafter on or about the 28th day of January, 1903, knowingly, wilfully, wantonly, wrongfully and in a grossly negligent manner sell and deliver three barrels of said mixture of coal oil and gasoline as "P. W." coal oil to the merchantile firm of Powers & Deselms doing a merchantile business at Orlando, in Logan County, Oklahoma Territory. That said firm of Powers & Deselms is composed of J. W. Powers and F. M. Deselms and that neither member of said firm or any of their clerks or employés of said firm had any knowledge or notice that said coal oil and gasoline had been mixed together nor had they any knowledge or notice of the dangerous character of said fluid mixture which they had purchased for and as coal oil.

That thereafter this plaintiff purchased at retail from the said firm of Powers & Deselms about one gallon of said mixture of coal oil and gasoline and conveyed the same to his home at Orlando, Oklahoma, in an ordinary coal oil can in which said mixture was kept at the house and residence of this plaintiff in the said town of Orlando, Logan County, Oklahoma Territory. That on or about the 4th day of February 1903, the said mixture of coal oil and gasoline which plaintiff had conveyed to his home and residence as aforesaid the same being a part of said mixture commingled together by said defendant as aforesaid, by reason, of its dangerous and explosive character occasioned by the aforesaid wrongful, wilful, wanton and grossly negligent acts of said defendant, exploded and
21 set fire to plaintiff's said house and then and there caused the death of the said Rosalie Deselms the wife of said plaintiff and burned and mutilated her body.

That the said Rosalie Deselms was a young woman of about 27 years of age, in good health and the mother of two children. That plaintiff is a young man of about 28 years of age. That by reason of the death of his said wife caused by the aforesaid wrongful and grossly neglingent acts of said defendant plaintiff has been damaged in the sum of $10,000.

Wherefore plaintiff prays for judgment against said defendant in the sum of $10,000, and costs of suit.

And for a further and second cause of action against the said defendant the plaintiff avers that he is the father and next — kin of one Fred S. Deselms; that prior to and at the time of his death the said Fred S. Deselms was a resident of Logan County, Oklahoma Territory, and that no personal representative of the said Fred S. Deselms is or has been appointed, and that there is no widow of the said Fred S. Deselms.

Plaintiff avers that the defendant is a corporation incorporated and existing under the laws of the State of Missouri.

That the said defendant is and was at the times hereinafter mentioned engaged in the business of handling and selling at wholesale coal oil and gasoline in Oklahoma, Texas and other states and that in the operation and carrying on of its said business the said defendant had and maintained an agency at the city of Guthrie in Oklahoma Territory and had and maintained thereat tanks for the storage of oils, different tanks being provided for coal oil than those used for the storage of gasoline.

Plaintiff avers that on or about the — day of January 1903, the said defendant carelessly and negligently mixed and commingled a large quantity of gasoline together with a large quantity of coal oil and immediately and on the same day after said fluids had been so carelessly and negligently mixed and commingled together as aforesaid the said defendant through its agents and employés discovered, and was fully informed and had knowledge of the fact that said fluids had been mixed and commingled together as aforesaid in one of the tanks of said defendant, located at its agency at the said city of Guthrie; that this mixture of coal oil and gasoline was highly inflammable, liable to explosion and particularly dangerous to be used as coal oil, which said defendant well knew.

22

That the said defendant knowing and being fully informed that said coal oil and gasoline had been mixed together did thereafter on or about the 28th day of January, 1903, knowingly, willfully, wantonly, wrongfully and in a grossly negligent manner sell and deliver three barrels of said mixture of coal oil and gasoline as "P. W." coal oil, to the mercantile firm of Powers & Deselms doing a mercantile business at Orlando, in Logan County, Oklahoma Territory. That said firm of Powers & Deselms is composed of J. W. Powers and F. M. Deselms and that neither member of said firm or any of their clerks or employés of said firm had any knowledge or notice that said coal oil and gasoline had been mixed together nor had they any knowledge or notice of the dangerous character of said fluid mixture which they had purchased for and as coal oil.

That thereafter the plaintiff purchased at retail from the said firm of Powers & Deselms about one gallon of said mixture of coal oil and gasoline and conveyed the same to his home at Orlando Oklahoma in an ordinary coal oil can in which said mixture was kept at the house and residence of this plaintiff in the said town of Orlando, Logan County, Oklahoma Territory. That on or about

the 4th day of February, 1903, the said mixture of coal oil and gasoline which plaintiff had conveyed to his home and residence as aforesaid the same being a part of said mixture commingled together by said defendant as aforesaid by reason of its dangerous and
23 explosive character occasioned by the aforesaid wrongful, willful, wanton and grossly negligent acts of said defendant, exploded and set fire to plaintiff's said house and then and there caused the death of him the said Fred S. Deselms the son of said plaintiff and burned and mutilated his body.

That the said Fred S. Deselms was a male child of the age of four years and was an active, healthy and robust child, that by reason of the death of his said son Fred S. Deselms caused by the aforesaid wanton, gross*ly* and negligent act of the said defendant plaintiff has been damaged in the sum of $10,000.

Wherefore plaintiff prays for judgment against the defendant in the sum of $10,000 and costs of suit.

And plaintiff for a third and further cause of action against the defendant, plaintiff avers that he is the father and next of kin of one Genora Deselms, deceased; that prior to and at the time of her death the said Genora Deselms was a resident of Logan County, Oklahoma Territory and that no personal representative of the said Genora Deselms is or has been appointed, and that there is no *widow* of said deceased Genora Deselms.

Plaintiff avers that the defendant is a corporation incorporated and existing under the laws of the State of Missouri.

That the said defendant is and was at the times hereinafter mentioned engaged in the business of handling and selling at wholesale coal oil and gasoline in Oklahoma, Texas and other states and that in the operation and carrying on of its said business the said defendant had and maintained an agency at the city of Guthrie, in Oklahoma Territory and had and maintained thereat tanks for the storage of oils, different tanks being provided for coal oil
24 than those used for the storage of gasoline.

Plaintiff avers that on or about the — day of January, 1903, the said defendant carelessly and negligently mixed and commingled a large quantity of gasoline together with a large quantity of coal oil and immediately and on the same day after said fluids had been so carelessly and negligently mixed and commingled together as aforesaid the said defendant through its agents and employés discovered and was fully informed and had knowledge of the fact that said fluids had been mixed and commingled together as aforesaid in one of the tanks of said defendant located at its agency at the said city of Guthrie, that this mixture of coal oil and gasoline was highly inflammable, liable to explosion and particularly dangerous to be used as coal oil, which said defendant well knew.

That the said defendant knowing and being fully informed that said coal oil and gasoline had been mixed together did thereafter on or about the 28th day of January knowingly, willfully, wantonly, wrongfully and in a grossly negligent manner sell and deliver three barrels of said mixture of coal oil and gasoline as "P. W." oil to the

mercantile firm of Powers & Deselms doing a mercantile business at Orlando, in Logan County, Oklahoma Territory. That said firm of Powers & Deselms is composed of J. W. Powers and F. M. Deselms and that neither member of said firm or any of their clerks or employés of said firm had any knowledge or notice that said coal oil and gasoline had been mixed together nor had they any knowledge or notice of the dangerous character of said mixture which they had purchased for and as coal oil.

25 That thereafter this plaintiff purchased at retail from the said firm of Powers & Deselms about one gallon of said mixture of coal oil and gasoline and conveyed the same to his home at Orlando, Oklahoma in an ordinary coal oil can in which said mixture was kept at the house and residence of this plaintiff in the said town of Orlando, Logan County, Oklahoma Territory. That on or about the 4th day of February, 1903, the said mixture of coal oil and gasoline which plaintiff had conveyed to his home and residence as aforesaid the same being a part of said mixture commingled together by said defendant as aforesaid by reason of its dangerous and explosive character occasioned by the aforesaid wrongful, willful, wanton and grossly negligent acts of said defendant, exploded and set fire to plaintiff's said house and then and there cause- the death of her the said Genora Deselms the daughter of said plaintiff and burned and mutilated her body.

That the said Genora Deselms was an infant child two years of age and in good health. That by reason of the death of his said daughter caused by the aforesaid wrongful and careless negligent acts of said defendant plaintiff has been damaged in the sum of $10,000.

Wherefore plaintiff prays for judgment against said defendant on this cause of action for the sum of $10,000. and costs of suit, and that he recover in the aggregate upon all the said causes of action in the sum of $30,000. and costs of suit.

J. C. STRANG AND
LAWRENCE & HUSTON,
Attorneys for Plaintiff.

Endorsed: No. 4068. Albert B. Deselms *vs.* Waters, Pierce Oil Co. Petition. Filed Mar. 25, 1903 Thos. A. Neal. Clerk District Court. J. C. Strang and Lawrence & Huston, Attorneys for Plaintiff.

26 Thereafter and on the 15th day of April, 1903, said defendant filed in the office of the clerk of the district court of said county, its answer, which answer, together with the endorsements thereon, is in the words and figures following, to wit:

In the District Court of the County of Logan and Territory of Oklahoma.

ALBERT B. DESELMS, Plaintiff,
vs.
WATERS-PIERCE OIL COMPANY, Defendant.

Answer.

Comes now the defendant and for answer to the petition of the plaintiff filed herein says:

First. That it denies each and every allegation in said petition contained.

Second. Defendant alleges that if the accident complained of by plaintiff in fact occurred it was caused by the negligence of the said Rosalie Deselms directly contributing thereto.

SHARTEL, KEATON & WELLS,
Attorneys for Defendant.

Endorsed: No. 4068. In the District Court of Logan County, Oklahoma Ter. Albert B. Deselms, Plaintiff *vs.* Water-Pierce Oil Co. Defendant. Answer. Filed Apr. 15, 1903, Thos. A. Neal, Clerk District Court, Shartel, Keaton & Wells, Attorneys for Def't.

27 Thereafter and on the 10th day of November, 1904, said cause was set for trial by said court, as appears from the following order upon the journal of said court:

No. 4068.

ALBERT B. DESELMS
vs.
WATERS-PIERCE OIL CO.

Ordered that this cause be set for trial December 1, 1904.

Thereafter and on the 22nd day of November, 1904, the plaintiff in said cause was given leave to reply, as is shown and appears from the order of the court upon the journal of said day, to wit:

4068.

ALBERT B. DESELMS
vs.
WATERS-PIERCE OIL CO.

Leave to plaintiff to reply out of time, instanter.

28 Thereafter and on the same day, to wit: November 22, 1904, the plaintiff in said cause filed in the office of the clerk of said court, his reply, which reply, together with the endorsements thereon, is in the words and figures following, to wit:

In the District Court of Logan County, Oklahoma Territory.

ALBERT B. DESELMS, Plaintiff,
vs.
WATERS-PIERCE OIL COMPANY, Defendant.

Reply.

And now comes the plaintiff and for reply to the answer of the defendant herein denies each and every allegation of new matter in said answer contained.

Wherefore, plaintiff prays judgment as in his petition.

LAWRENCE & HUSTON,
STRANG & DEVEREUX,
Attorneys for Plaintiff.

Endorsed: No. 4068. Albert E. Deselms, plaintiff, *vs.* Waters-Pierce Oil Company, Defendant. Reply. Filed Nov. 22, 1904, Thos. A. Neal, Clerk District Court. Lawrence & Huston, and Strang & Devereux, Attorneys for plaintiff.

29 Thereafter and on the 2nd day of December, 1904, said cause was stricken from the trial calender, as appears and is shown by the order of the court on the journal of said day, as follows:

4068.

ALBERT B. DESELMS
vs.
WATERS-PIERCE OIL CO.

Ordered by the court that this cause be, and the same is hereby stricken from the trial calender for further orders.

Thereafter and on the 14th day of February, 1905, said cause was regularly set for trial March 2, 1905, as appears from the order of the court on the journal of said day, as follows, to wit:

4068.

ALBERT B. DESELMS
vs.
WATERS-PIERCE OIL CO.

Ordered by the court that this cause be set for trial March 2, 1905.

30 Thereafter and on the 28th day of February, 1905, the plaintiff in the above cause asked leave of court, in open court to dismiss his first cause of action, and the court, after hearing said request, makes the following order, to wit:

4068.

ALBERT B. DESELMS
vs.
WATERS-PIERCE OIL CO.

Comes now the plaintiff by his attorneys and dismisses his first cause of action in the petition without prejudice.

It is therefore ordered by the court that said first cause of action, be, and the same is hereby dismissed, without prejudice to a future action.

Thereafter and on the 3rd day of March, 1905, said cause came on regularly for trial, both parties announcing ready for trial, the following proceedings were had as appears from the journal of said court on said day, to wit:

31 4068.

ALBERT B. DESELMS
vs.
WATERS-PIERCE OIL CO.

Now on this 3" day of March, A. D. 1905, this cause comes on for trial, the plaintiff appears in person and by Lawrence and Huston and John Devereux, his attorneys, and the defendant appears by Shartel, Keaton and Wells, its attorneys, and both parties announcing ready for trial, the court orders a jury empannelled for the trial of said cause, and come now the following good and lawful jurors, members of the regular panel, to wit:

C. F. Herwig, John L. Alexander, J. F. Lewis, F. I. Thomas, Grant McFetridge, Mote Stovall, A. Luckenbill, E. C. Lothlen, J. J. Herley, Green Cecil, G. N. Brown and A. C. Drennen.

And now the hour of noon arriving, the court admonishes the jury and grants permission to said jurors to separate until 1:30 P. M. of this day, until which time the further trial of said cause is adjourned.

32 Thereupon, after statement of the cause by counsel for plaintiff, and waiver of statement of cause by counsel for the defendant, the following proceedings were had, as is shown and as appears by the transcript of the evidence by the court reporter of said court, to wit:

In the District Court of Logan County, Oklahoma Territory.

ALBERT B. DESELMS, Plaintiff,
vs.
WATERS-PIERCE OIL COMPANY, Defendant.

Transcript of Evidence.

Tried at the February, 1905, term of the above entitled court, before Honorable John H. Burford, Judge and a Jury.

Appearances.

For the plaintiff, Lawrence & Huston, John Devereux.
For the Defendant, Shartel, Keaton & Wells.

N. M. CARTER, being called and sworn as a witness for the plaintiff, testified as follows:—

By Mr. SHARTEL: The defendant objects to the introduction of any testimony under the second count of this petition, because the second count fails to state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

Which objection was by the Court overruled, to which the defendant excepted.

The defendant also objects to the introduction of any evidence under the third count of the petition, because the same fails to state facts sufficient to constitute a cause of action against
33 the defendant and in favor of the plaintiff. Which objection was by the Court overruled, to which the defendant excepted.

By Mr. SHARTEL: Now the defendant at this time offers to admit that on the 19th day of January, 1903, there was an accidental mixture in a tank of oil containing 6666 gallons of coal oil, in which there was mixed by mistake 305 gallons of gasoline, and that the defendant was at once apprised of the mixture and upon full consideration of the fact, directed its agent in charge of the tank to sell the contents of the tank as ordinary illuminating coal oil, with full knowledge of all the facts.

By the COURT: Where?

By Mr. SHARTEL: At the tank, in the city of Guthrie, Oklahoma.

Direct examination by Mr. HUSTON:

Q. State your name?
A. N. M. Carter.
Q. What is your business?
A. I am local agent for the Waters-Pierce Oil Company.
Q. Local agent at what point?
A. Guthrie.
Q. You heard the admission made by counsel for the defendant, of the mixture of coal oil and gasoline?

A. I did.
Q. It occurred at this agency?
A. Yes sir.
Q. Are you the agent of the company that communicated the fact of the mixture to headquarters?

Objected to as immaterial, which objection was by the court overruled, to which the defendant excepted.

A. The agent for the company that communicated to headquarters, yes sir.
34 Q. State whether or not you sold or shipped or placed upon the market any of that mixture until after you heard from headquarters?
A. I did not.
Q. Was the direction to place the mixture upon the market in writing?
A. Yes sir.
Q. Have you that letter?
A. Yes sir.
Q. Will you produce it?
A. Witness produces letter.
Q. Mr. Carter, is this the letter which you identify and hand me, in which your instructions were contained as to the disposal of this mixture?
A. Yes sir.

Here the same is offered in evidence as Exhibit "A."

By Mr. SHARTEL: Objected to as incompetent, irrelevant and immaterial; we admit we instructed Carter to sell this oil.
By the COURT: I don't see that anything more could be covered by the letter?
By Mr. HUSTON: We have alleged in was done wantonly, and without any care for the consequences. I think we are entitled, notwithstanding their admission, to show the terms.
By the COURT: It may go in evidence.
To which the defendant excepted.
By Mr. SHARTEL: I specifically object to that part of the letter where the writer expresses his individual views as to the good or bad qualities of the oil, as incompetent, an improper conclusion and immaterial.
Which objection was by the Court overruled, to which the defendant excepted.
The same is here read to the jury as follows:

35 EXHIBIT "A."

Water Pierce Oil Company.

Incorporated under the Laws of the State of Missouri, May 29th, 1900.

A 1107. DENISON, TEXAS, 1/20, 1903.

Northern Texas Division. E. T. Hathaway, Manager.

Mr. N. M. Carter, Agt., Guthrie.

DEAR SIR: I am sorry to note from your favor of the 19th. inst. that Mr. Davis, your driver, through error let about 300 gals. of gasoline run into your P. W. oil storage tank, and cannot believe that this amount of gasoline will materially effect the burning quality of the P. W. Oil, at any rate we will now have to watch the matter, and take chances on selling all of the P. W. Oil in P. W. Oil storage tank, trusting the same will give good results.

You will please advise us by return mail whether the pipe connections in the ware house are so arranged that P. W. Oil can run into your gasoline storage tank when the valves are left open, and if such be the case you will please see that the pipes are disconnected at once, obviating any risk whatever of oil getting into the gasoline when the valves are left open.

If you are confident that there were only about 300 gals. gasoline run into your P. W. Oil storage tank you can at the end of this month make a transfer invoice, attaching same to your Jan. stock report, transferring 300 gals. of gasoline to 300 gals of P. W. Oil, account of error mentioned above.

Yours very truly, J. W. WAGNON,
Ass't M'g'r.

36 Q. Mr. Carter, upon receipt of that letter state whether or not you proceeded to place this mixture of coal oil and gasoline upon the market?

A. On the receipt of that letter I proceeded to sell the mixture on the general market.

Q. State how much of that mixture, if any, you sold to the firm of Powers & Deselms, at Orlando?

A. I think I sold them three barrels of it.

Q. When the barrels are shipped out from your agency here, what do you have upon them to show whether or not they have been inspected?

A. At that time there wasn't anything.

Q. Didn't you have tags?

A. We tagged them, but under the law we weren't required——

Plaintiff objects as to what the witness thinks of the law——

A. At that time we simply tagged the package and marked it to the purchaser.

Q. You charged for the inspection?
A. On making the invoice.
Q. You charged the retail dealer the inspection fee, did you not?

Objected to as immaterial, which objection was by the court sustained, to which the plaintiff excepted.

Q. When would you have the oil inspected?

Objected to as not the best evidence—sustained.

Q. Did you have this coal oil inspected?
A. This mixture wasn't inspected.
Q. Was the coal oil?
A. The oil——
Q. The oil itself was inspected?
A. Yes sir.
Q. And after you made the mixture, you didn't have that inspected?
A. No, sir.
37 Q. You sold that as P. W. oil, did you?
A. Yes sir.
Q. Did you inform Powers & Deselms that it contained a mixture of gasoline and coal oil?
A. I did not.
Q. Do you know that the test of that mixture was, or what the flash point was?
A. I am not positive but——
Q. If you are not positive I don't want you to state; when was that oil received here at Guthrie?
A. The oil?
Q. Yes sir.
A. The last car I think was received on the 13th or 14th of January.
Q. When was the gasoline received?
A. The gasoline was received on the 19th, that is, it was on the 19th of January that we attached the pipes.
Q. When was the coal oil and gasoline mixed together?
A. On the morning of the 19th of January.
Q. And that fact you immediately communicated to headquarters?
A. Yes, sir.
Q. And did nothing with the mixture until you received this letter?
A. I did not.
Q. Examine this Mr. Carter, state whether or not that is the invoice of the oil or of the mixture in fact which you shipped to Powers & Deselms at Orlando?
A. I believe that to be the invoice of the three barrels of which I spoke.
Q. Mr. Carter, I want to call your attention to the word "fee" in the body, and then over in that line $.45," what does that represent?

38 A. The company had a rule of charging a net price for the oil, and it was 15 cents a barrel for inspection; there was three barrels. In invoicing that out, we charge the price for the oil and add the inspection fee which would be 45 cents. We paid the inspection fee to the inspector and charged it up to the purchaser.

Q. That 45 cents inspection fee you charged up to the firm of Powers & Deselms?

A. Yes sir, that was rulable on all invoices.

Cross-examination by Mr. SHARTEL:

Q. Did you make a practice of charging that 15 cents irrespective of whether the oil had been inspected?

Objected to as incompetent, irrelevant and immaterial, which objection was by the Court sustained, to which the defendant excepted.

Q. I believe you stated that this mixture never was inspected by the inspector?

A. Not—

Q. At least until long after that time?

A. Sometime after it, probably was ten or twelve days after, probably was, it wasn't at that time.

Q. What kind of barrels were these?

A. These were iron barrels, what we call iron barrels.

Q. Did those barrels contain any marks or brands of any kind placed on them by the inspector?

Objected to as incompetent, irrelevant and improper cross examination, which objection was by the court overruled, to which the plaintiff excepted.

A. They did not.

39 Q. Did they contain any marks or brands placed on them by the company in reference to their inspection on other tanks?

A. They did not.

Q. What was the extent of that mixture, Mr. Carter?

A. The extent of the mixture that ran into that tank?

Q. Yes sir.

A. On a careful measurement, according to our schedule, there was about 6666½ gallons, is my recollection, of oil in the storage tank at the time the pipes were connected by mistake to the gasoline car, and after the gasoline was shut off, it showed a measurement by the same scale of 305 gallons of gasoline that went into the 6600 and something of oil. That is arrived at by measuring the storage tank before, when we received the car of oil we took the measurement of the storage tank, and the inches there is in it before pumping it. After emptying a car into it we measure it again to know the feet and inches there is in it, and that gives us the number of feet and inches that always goes into the storage tank, that is calculated by a scale that is believed to be absolutely accurate.

Q. You in this case, then, took the measurements of the contents of this tank before this gasoline was emptied into it?

A. Yes sir.
Q. And you took the measurements afterwards?
A. Yes sir.
Q. How long have you been in the oil business, Mr. Carter?
A. Well, I have been with the Waters-Pierce Company nearly sixteen years.
Q. Are you able to state Mr. Carter whether that mixture of gasoline in that oil, rendered the mixture dangerous for use for ordinary illuminating purposes?

40 Objected to as to the competency of the witness and as improper cross examination, which objection was by the Court sustained, to which the defendant excepted.

Q. You may state, Mr. Carter, how much of this mixture was sold all together?

Objected to as immaterial, which objection was by the Court sustained, to which the defendant excepted.

J. W. POWERS, a witness for the plaintiff, being called and sworn, testified as follows:

Direct examination by Mr. HUSTON:

Q. State your name to the jury.
A. J. W. Powers.
Q. Where do you reside?
A. At Orlando, Oklahoma.
Q. With whom, if anyone, are you associated in business?
A. Fred M. Deselms.
Q. What is the name of your firm?
A. Powers & Deselms.
Q. What business is the firm engaged in?
A. General merchandise.
Q. Are you acquainted with N. M. Carter, the agent of the Waters-Pierce Oil Company, at Guthrie, Oklahoma?
A. Yes sir.
Q. How long have you known him?
A. Ten years.
Q. How long has your firm been doing business with the Waters Pierce Oil Company?
A. Almost ten years, ten years the 15th of this month.
Q. State whether or not your firm ordered any coal oil from the Waters-Pierce Oil Company the latter part of the month of January, 1903?

41 A. We did.
Q. How many barrels or what was the quantity of the order?
A. My recollection is at this time we had a standing order of two barrels per week, and at this time through an order from a country store we increased the order to three barrels.

Q. Give as near as you can the date when that shipment of three barrels was made to your firm?

A. The 28th of January, 1903.

Q. Examine this instrument, state what it is.

A. It is an invoice for the three barrels of oil which we received at this time.

Q. Observe in the second line the word "fee" "45" cents, what does that indicate?

A. It indicates that we were charged inspection fee of 15 cents per barrel for the inspection of this oil.

Q. State whether or not you believe that this oil was inspected?

Objected to as incompetent, irrelevant and immaterial under the issues, which objection was by the Court sustained, to which the plaintiff excepted.

Q. State whether or not you paid this 45 cents inspection fee charged up by the company?

Objected to as incompetent, irrelevant and immaterial which objection was by the court sustained, to which the plaintiff excepted.

Plaintiff here offers in evidence Invoice identified by the witness, marked Exhibit "B."

There being no objection, the same is admitted and is as follows:

42 EXHIBIT "B."

Corrections must be claimed on receipt of bill.

Invoice No. 221 GUTHRIE 1/28 1903.

M. Powers & Deselms, Orlando, to Waters Pierce Oil Company, Dr.

Incorporated under the laws of the state of Missouri May 29, 1900.

Subject to sight draft.
Iron barrels must be emptied and returned to us promptly.

3 I Bbls. P. W. Oil.....151 2 16 2	25.00
Fee	.45
	25.45

#10690
10691
10680

Freight paid.
Corrected Inv.
Gasoline not sold for illuminating purposes in houses.

Q. State what if any marks or brands were on the barrels, if you remember.

Objected to as incompetent, irrelevant and immaterial under the issues, and not supported by any allegation of the petition, which objection was by the court sustained, to which the plaintiff excepted.

Q. Now, what was done with those three barrels of oil that were shipped to you as you have testified?

A. One was sent to W. A. Caywood at Potter, Oklahoma.

Q. Where is Potter?

A. About 7 miles northwest of Orlando.

Q. What was done with the other two barrels?

A. We received them at our store.

Q. At your storage——

43 By the COURT: What was your answer?

A. The other two barrels were received at the storage tank at the store at Orlando.

By Mr. HUSTON: What did you do with them, where did you put the oil that was in the barrels?

A. I didn't empty it myself.

Q. Did you cause it to be emptied, have any of your clerks to empty it?

A. I caused the clerk to empty it in the storage tank where we always carry this oil.

Q. What storage tank did you empty it into?

A. A galvanized tank.

Q. Coal oil tank or gasoline tank?

A. Into the coal oil tank.

Q. What was the condition of the tank before these two barrels were poured in there?

A. It was empty.

Q. What date did you say the barrels were received, if you remember?

A. About the 29th of January, 29th or 30th of January.

Q. Are you acquainted with Bert Deselms?

A. Yes sir.

Q. Or A. B. Deselms?

A. Yes sir.

Q. Did you know him then in January and February of 1903?

A. Yes sir.

Q. What was he engaged in at that time?

A. He was in our employ as clerk.

Q. Have you any personal knowledge of your own as to whether he purchased or procured any of this oil that you have been testifying about?

44 A. I met him with his empty oil can coming to the store on Sunday morning.

Q. Now that was on Sunday morning?

A. Yes sir.

Q. Do you know anything about the burning of his house and the death of his wife and children?

A. Yes sir, I saw the house burning.

Q. When did that occur?

A. On the 4th of February, 1903. Do you want the time?

Q. After the burning of that house and home and family, did you receive any communication from the Waters-Pierce Oil Company?

A. I did, yes, sir.

Q. Examine that letter and state whether or not that is the letter?

A. Yes, sir, that is the letter.

Here the same is offered in evidence as Exhibit "C."

Objected to as incompetent, irrelevant and immaterial, hearsay, and not admissable under any issue in this case, which objection was by the Court overruled, to which the defendant excepted.

Objected to on the further ground that it is an after-declaration of an employé of the defendant and inadmissable on that ground, as a part of the *res gestæ*, which objection was by the court sustained, to which the plaintiff excepted.

Q. What did you do with this oil that was in your storage tank and the oil that you had sent out to Mr. Caywood at Potter after this fire?

Objected to as incompetent, irrelevant and immaterial under any issue in this case, which objection was by the Court sustained, to which the plaintiff excepted.

Q. Mr. Powers, state whether or not you preserved any samples of that mixture?

45 A. I did.

Q. Tell the jury how you preserved it, and what did you do in the way of preserving the samples?

A. They were drawn off in glass bottles and sealed and witnesses that were there at the time it was drawn off wrote their names on a strip of paper, and this was sealed down over the cork in such a way that the cork could not be removed without it destroyed the papers with the names upon it.

Q. How were the tops sealed, what was used to seal the tops?

A. Plaster paris.

Q. Would you recognize or identify your name or signature or initials that you placed on any of those bottles.

A. Yes sir.

Q. After the bottles were filled with that mixture and labelled in that way, what was done with the bottles?

A. They were carried to Mr. Cowman's drug store.

Q. Into whose custody were they given?

A. E. E. Cowman.

Q. The druggist?

A. Yes sir, the druggist at Orlando.

Q. Mr. Powers, did you go down to where the fire was that day?

A. Yes sir.

Q. Were you the first there or were others ahead of you?

A. Others were ahead of me.

Q. What first attracted your attention to the fire?

A. The cry of fire.

Q. Do you remember the kind of a day, the 4th of February, 1903 was?

A. Early in the morning it was a still day; along about 9 o'clock in the morning the wind went to the northwest and turned cold, and a hard wind blowing.

46 Q. Where was A. B. Deselms' house situated?

A. In Orlando.

Q. What part of the town?

A. In the western part of Orlando.

Q. In Logan County, Oklahoma Territory?

A. Yes sir.

Q. About what time were you alarmed by the cry of fire?

A. Somewhere near 10 o'clock in the morning, I couldn't state the exact time.

Q. Now tell the jury when you went there what you saw first?

A. Smoke was coming out under the shingles all over the roof of the house, a black smoke; the house was all afire inside and beginning, seemingly, to break through the roof.

Q. When you first went there, did you know whether or not there were any human beings in the house?

A. I did not.

Q. What did you later discover?

A. That there was.

Q. Was entry made into the house later?

A. Yes sir.

Q. Were you acquainted with Mrs. Rosalie Deselms in her lifetime?

A. Yes sir.

Q. Did you know Fred S. Deselms or Fred Deselms, the child of Bert Deselms?

A. I did.

Q. Were you acquainted with his little girl Genore?

A. Yes sir.

Q. Describe Fred Deselms, the boy, to the jury, as to his size age and apparent health?

A. He was about four years old, considered a healthy child, active, a good, nice child, he was liked by people, they liked him

47 as a boy, baby, and at this age he was an active nice boy?

Q. How about the little girl?

A. She was a very sweet little girl, everybody that came in contact with her couldn't help but love her.

Q. When you got into the house, what did you discover there as to the persons, first?

A. When I got—my house is close to this place, and the wind was blowing in that direction,—first I went toward my place to see if there was any danger from fire there; I saw this other was burning so far there couldn't be nothing done to save the house, and went to protect my own property first. Mrs. Emory came running to me and told me that Rose Deselms, Fred and the baby were in the house and they couldn't find them anywhere; then I went over there. About that time they had pushed in or made an entrance at the west

end of the house, at the northwest corner, and were dragging the bed out with this little boy upon it.

Q. What was the condition of the little boy then?

A. He was dead; his hair was burned off his head and otherwise his body was burned badly.

Q. Did you observe how he was lying on the bed?

A. His face downward.

Q. His face was in the bed clothing?

A. That is my recollection of it, yes sir.

Q. Now, did you see the little girl?

A. Yes sir, she was taken from the south side of the house.

Q. Where was she when you first observed her, when you went down there that morning?

A. I can't answer that question.

Q. I say where was she when you first saw her?

A. She way lying on the south side of the house, between her mother and the position where the little boy had been dragged
48 out; like this was the bed over here, and here was the little girl, Genore lying here.

Q. On a bed also?

A. I couldn't say as to that; mother was laying with her feet back from the stove, sort of in this position, and the little boy further east.

Q. What was the condition of the little girl?

A. Badly burned, the body was charred.

Q. Living or dead?

A. Dead.

Q. Now describe the position in the room of Mrs. Deselms, the mother?

A. She was lying on her side, back from the stove, with her feet right close up to the stove, lying back in this direction, kind of southwest from the stove.

Q. Did you observe anything else in the room?

A. Not at that time.

Q. Did you observe an oil can?

A. After the fire had burned down so we could make an entrance.

Q. Where was it?

A. The top of it was laying——

Objected to as incompetent, irrelevant and immaterial, which objection was by the court overruled, to which the defendant excepted.

Q. Go ahead.

A. —laying to the head of the mother, I can't say where the rest of the can was.

Q. When you say the top, do you mean the stopper or the whole top?

A. The whole top out of the can.

49 Q. Had that been blown off, that is the whole shoulder of it?

Objected to as incompetent, irrelevant and immaterial, and calling for a conclusion, which objection was by the Court sustained.

Q. Just describe then the appearance of that top, state more fully as to what you mean by the top of the can.

A. It was a two gallon, galvanized oil can, the whole top of the can, where it starts to taper, in, from here up, is what I refer to.

Q. Do you remember where the oil can itself was at this time?

A. No sir.

Q. The rest of the can?

A. No sir.

Q. Did you observe the stove that was in the room?

A. I did.

Q. About what position in the room was the stove, what was its location in the room as to the center or side?

A. It was near the center of the room north and south, and pretty well toward the east side of the room.

Q. Describe that stove to the jury, what kind of stove it was.

A. It was a coal stove used with a bowl, of course of cast—a little further up, kind of a drum all above the bowl was of sheet iron, as such stoves are usually constructed, on the order of the stove back yonder, and trimmings on the top of the stove like an ordinary coal stove.

Q. What was the size of the stove?

A. Perhaps would stand somewhere about this high from the floor.

Q. Now, did you observe the inside or the contents of the stove?

A. I did.

Q. Tell the jury what you observed.

50 A. Some papers laying in the bowl of the stove, and some sticks of kindling of wood laid on top of this, and no fire in the stove, just merely charred over, that is, seemed to be charred, kind of flashed over, kind of browned but not burned.

Q. Was there any fire in the stove at all?

A. No sir.

Q. About what time in the day did you say that occurred?

A. Somewhere near ten o'clock in the morning .

Cross-examination by Mr. SHARTEL:

Q. About how far was that house from your store?

A. About three blocks and a half.

Q. Something like quarter of a mile?

A. Yes sir.

Q. Were you at your store when you heard this alarm of fire?

A. Yes sir.

Q. You went and looked out and saw the direction of the smoke?

A. Yes sir.

Q. And then started?

A. No answer.

Q. You proceeded somewhat rapidly, it being in the neighborhood of your own home?

A. I did.

Q. You got there and found a number of people there when you got there?

A. Yes sir.

Q. How many?
A. I couldn't state how many, there was quite a crowd had gathered.
Q. The fire had made such headway that you then went over to your own place to look after that?
51 A. I did.
Q. And how long were you over there?
A. Perhaps ten—not more than ten minutes.
Q. Then you went back to the scene of the fire?
A. Yes sir.
Q. Who was there engaged in the effort to remove the bodies from the house, when you got back there?
A. I couldn't give the names.
Q. How large a house was this, Mr. Powers?
A. Twelve by twenty-four, fourteen by twenty-four, something of that size.
Q. Composed of two rooms?
A. Yes sir.
Q. Were the rooms about the same size?
A. The west room was the larger room.
Q. Which way did the house extend the longest way, east and west or north and south?
A. East and west.
Q. Was there much wind blowing at the time?
A. Yes sir, the wind was blowing strong at that time.
Q. Stiff gale?
A. Yes sir.
Q. How many chimnies or stove pipes did the house have coming out the roof?
A. One is my recollection.
Q. Where was that, in the middle of the house or at one end?
A. I am not prepared to answer that.
Q. Where was the room that this heating stove was in on the east or west side of the house?
A. On the west side of the house, the west end of the house, in the west room.
52 Q. And the stove was in the east side of the west room?
A. Pretty well toward the east side of the west room, yes sir.
Q. The stove must have gone up into a flue then on the east side of the west room, didn't it?
A. I stated I am not prepared to answer that.
Q. You don't recollect?
A. No sir.
Q. What use was made of the west room?
A. As a living room and sitting room.
Q. What use was made of the east room?
A. It was the kitchen.
Q. And dining room?
A. I couldn't say as to that.
Q. How many stoves were there in the house?

A. Two stoves.

Q. The heating stove in the west room, and the cooking stove in the east room?

A. Yes sir.

Q. That stove was sort of a cylinder shape stove, wasn't it, the fire box on the bottom was cast iron, then there was an upright cylinder over that of sheet metal of some kind?

A. Yes sir.

Q. And still above that was sort of a top to it?

A. Yes sir.

Q. Something like what we ordinarily call Round Oak stove?

A. Yes sir, something similar.

Q. Probably two feet and a half high or three?

A. Well possibly, somewhere in that neighborhood.

Q. Now, at the time you were there during the fire and assisted in removing the bodies of the victims, you didn't notice the coal oil can at that time, while the fire was burning there, and you were taking out the bodies?

53 A. No sir.

Q. You noticed the top of the can afterward?

A. Yes sir.

Q. Well, this coal oil can you say was a two gallon can?

A. Yes sir.

Q. Metal can?

A. Yes sir.

Q. It was also in the shape of a cylinder, and then around the top there was a cone?

A. Yes sir.

Q. And put together right around the shoulder with solder?

A. I couldn't say as to that.

Q. That is the way those cans are ordinarily made, aren't they, you handle them in your business, don't you?

A. Galvanized cans aren't made that way as a rule.

Q. How are they put together?

A. There is possibly some solder used, I couldn't say as to that.

Q. There is a joint right where the top goes on?

A. Yes sir.

Q. Then there is one joint goes up and down where the metal is bent around it,—some sort of metal is used to fill those joints, to keep the can from leaking, isn't it?

A. It is done to couple by the pressure.

Q. Pressure of the tin, and possibly filled with solder?

A. I couldn't say as to that.

Q. What else was there about the can, was there a handle to it?

A. A bail.

Q. Set down on the side of the can with ears?

A. Yes sir.

Q. And the ears fastened to the side of the can, now was there a spout?

54 A. Yes sir.

Q. Where was that built, to the top of the can?

A. In this cone.
Q. Near the top.
A. Near the top; yes sir, in the cone shape.
Q. How long a spout was it?
A. Well, they run from two to three inches, somewhere along there.
Q. Taper down to a point the size of a lead pencil?
A. Somewhere near that.
Q. What condition was this in when you found it, was it all in one piece, or did you merely find fragments of it, or what shape was it in when you found it?
A. The cone part of the can was all I can testify to.
Q. Was that all in one piece?
A. Yes sir,—I won't say as to that spout.
Q. Don't know whether the spout was fixed to it or not?
A. I couldn't say as to that.
Q. Well, what condition were the edges of this cone shaped piece in?
A. I am not prepared——

By the COURT: Did anyone preserve it?
A. Not as I know of.

By Mr. SHARTEL: Did you succeed in finding the rest of the can?
A. I did not.
Q. Did you look for it?
A. I didn't.
Q. When was it in reference to the fire when you saw this top?
A. What time do you mean?
Q. Yes sir.
A. After the bodies had been removed from the fire.
55 Q. Well, was the fire extinguished or had it burned out?
A. It pretty nearly burned out.
Q. Did the roof of the building fall in?
A. It was shoved over.
Q. And did the building itself collapse when it was pushed over?
A. In a measure, not all of it.
Q. How did they push it over?
A. With a pole.
Q. Get a log or something of that kind?
A. Something to push the side of the house in, push it over out of the way, yes, sir.
Q. Was the entire house moved off of the site, or was the roof pushed off or to what exent was it?
A. The roof was pushed nearly off of it, shoved to the southeast.
Q. How much of the house was left when it got done burning?
A. I stated before the house was nearly all consumed.
Q. Was there any of the walls left standing?
A. No, sir.
Q. Any of the roof left?
A. It was charred, all in coals.
Q. To what extent was the floor burned?

A. Pretty nearly all charred, made into coals.

Q. Was the floor burned any so as to let the stove down through the floor when you saw it?

A. When I saw the stove?

A. Yes, sir.

A. Yes, sir, so it would tip some.

Q. Did the stove ever go down through the floor or was it still left suspended down where the floor was?

A. It burned up so that it went——

56 Q. Went clear through, now when you saw the top of the coal oil can was it down through the floor or still on top of the floor?

A. It was mixed with the coals from the stove, the charcoal from the burning of the house.

Q. Was it where the floor had been or was it down on the ground among the debris from the fire when you saw it?

A. The floor was burned into coals; the can was mixed with the debris.

Q. The question I am getting at, was the floor still in place?

A. No, sir.

Q. It had gone down?

A. Yes, sir.

By the COURT: Were the joist burned?

A. Yes, sir, the joist were burned.

By Mr. SHARTEL: Had the joist burned out from under the stove, did it go down to the ground?

A. It settled down and leaned to the west.

Q. What condition was the cook stove in?

A. I didn't take particular notice of that.

Q. You didn't take notice of that?

A. No, sir.

Q. How many beds were there in the west room?

A. I am not prepared to state, I don't recollect.

Q. I believe you said the stove was near the east wall and about the center of the room north and south, that is the heating stove?

A. Somewhere near.

Q. Which end of the house appeared to be the worst on fire when you got there?

A. The west room.

57 Q. Were there any explosions after you got there?

A. Not that I noticed.

Q. Did you hear any report of any explosion?

A. No, sir.

Q. The little boy was lying face downward on a bed when you first saw him?

A. They were dragging him out on the remainder of the bed clothes.

Q. Was that bed on the floor or on a bedstead?

A. I couldn't state exactly; it was on bed-springs.

Q. Had they gone inside the building or used a pole or something of that kind to reach him?

A. The bed was in the northwest corner of the room; the wind was blowing from the northwest, and it carried the flame away from them, and made it possible to drag this out.

Q. Did they go inside the building or use something to reach in?

A. They couldn't get inside the building.

Q. How did you get the bed out?

A. What they used to drag the bed out, I can't recollect.

Q. How did they manage to reach the other bodies?

A. Hauled water there and poured water around on the fire so as to get in.

Q. Now the body of Mrs. Deselms, I believe you said was south west from the stove?

A. Yes, sir.

Q. With her feet toward the stove?

A. Yes, sir.

Q. The body of the little girl was in what position?

A. To the south side of the room, some three or four feet away from Mrs. Deselms, possibly a little more, possibly a little less.

58 Q. How long after the fire did you make an examination of the stove?

A. After the bodies had been removed, I suppose perhaps a couple of hours.

Q. Had the ceiling or anything else fallen in by that time, or the walls tumbled in?

A. You might say the house was completely consumed.

Q. I want to get at, Mr. Deselms, how the house went down when the fire had got in its work, did it fall down or did it just stand up in position and burn down?

A. I stated before they pushed it over some so as to get into the house.

Q. Well, did they push the roof clear off the house or did the fire burn the roof down or did it fall in?

A. They didn't push it clear off, as I remember it.

Q. Did it fall in when the rafters burned in two or the other supports, or did it stay up?

A. It fell to the south and was still burning.

Q. Did it fall clear away from the house when it fell, or did it fall down into the building?

A. It fell away from it some, not clear from over the foundation, no.

Q. Part of the roof did come down into the rooms?

A. Yes, sir, part of it.

Q. How about the north walls, did they fall down or did they stand up and just burn out in position?

A. They were pushed over; they were pushing from the north side of the house to get in.

Q. Then the north wall must have fallen down into the room, didn't it?

A. Yes, sir, it must have.

59 Q. When was that done in reference to the time you saw the stove?

A. That was done before, while the fire was burning?

Q. Was the flames extinguished or did you have to wait until it burned out, before you observed what was in the stove?

A. We had to wait until the fire had burned down, and sufficient water poured on the coals to make it possible for us to go in there.

Q. Then when you got in there what condition now did you find that stove in?

A. Slightly leaning to the west.

Q. Was the stove pipe still up?

A. No, sir.

Q. Was the stove pipe down among the debris?

A. I couldn't say as to the stove pipe.

Q. Don't know where the stove pipe was?

A. No, sir, I don't.

Q. Don't know whether there was a stove pipe running through the roof or whether it was a brick flue?

A. A definite answer I can't give on that.

By Mr. HUSTON: I want to ask you Mr. Powers as to the condition of the stove, and what you observed about the stove as to its general condition?

A. It was slightly leaning to the westward, it was in position so we could look down into it.

Q. That is its position, now its condition?

A. It was in position as far as we could see down in the bowl of the stove and see the contents.

Q. What about the top of the stove?

A. My recollection is there wasn't any top on the stove.

Q. What about the door of the stove?

A. I can't answer to the condition of the door.

By the COURT: When did they take these burned bodies out, was that after they had pushed that wall over and the roof over,
60 or had they got them out before?

A. After they had pushed these over; the fire was such we had no protection, and it was impossible to.

Q. Was it after the wall had burned that it was pushed in there?

A. Yes, sir.

Q. Was that when the boy was taken out or was he got out before?

A. They pushed it over so that they could get at him before.

Q. They got him out first?

A. Yes, sir.

Q. Brought him out on the springs and bed clothing?

A. Yes, sir.

Q. And these other charred remains you found after the fire was extinguished sufficiently so that you could go into it?

A. Yes, sir.

By Mr. HUSTON: I think counsel will probably agree that there has been no administrator appointed for either the little boy or the little girl, Genore, do you admit that?

By Mr. SHARTEL: We are wholly unaware of the facts in regard to it.

J. C. STRANG, a witness for the plaintiff, being called and sworn testified as follows:

Direct examination by Mr. HUSTON:

Q. State your name.
A. J. C. Strang.
Q. What if any official position do you hold in this county?
A. Probate Judge.
Q. As such probate judge have you custody of all the records showing the appointment of administrators?
A. Yes, sir.
61 Q. State whether or not there has been any appointment of administrator for Fred S. Deselms, deceased?
A. There has not.
Q. Has there been any appointment of administrator of Genore Deselms, deceased?
A. No, the only administration in connection with the family is of record in the court, Albert B. Deselms for Rosalie Deselms.
Q. That is the only appointment of any administrator there is?
A. Yes sir, I have the record here in court, but I have examined it carefully, and there is no other.

HERMANN MUHLEHERR, a witness for the Plaintiff, being called and sworn, testified as follows:

Direct examination by Mr. HUSTON:

Q. State your name.
A. Hermann Muhleherr.
Q. Where do you live?
A. Orlando, Oklahoma.
Q. What is your business?
A. Bookkeeper at the Farmers Bank.
Q. Where were you living in January and February, of 1903, and what were you engaged in?
A. I was clerk for Powers & Deselms, of Orlando, Oklahoma.
Q. Were you there on or about the 29th of January, 1903?
A. Yes sir.
Q. Do you know of this shipment of three barrels of oil from the Waters-Pierce Oil Company to the firm of Powers & Deselms, about that time?
A. Yes sir.
Q. State whether or not you saw it after it was shipped up there?
62 A. I emptied two barrels of it in our storage tank.
Q. What was the condition of the storage tank at the time these two barrels were emptied therein?
A. It was empty, and had been empty for a few days, at least one day. if not more.
Q. What was done with the other barrel, the third barrel?
A. The third barrel was sent to a country mershant, by the name of Caywood.

Q. How were the barrels marked?

Objected to as incompetent, irrelevant and immaterial under any issue in this case, which objection was by the court sustained, to which the plaintiff excepted.

A. B. DESELMS, the plaintiff, being called and sworn as a witness in his own behalf, testified as follows:

Direct examination by Mr. HUSTON:

Q. State your name to the jury.
A. A. B. Deselms.
Q. State your full name.
A. Albert B. Deselms.
Q. Are you the plaintiff in this case?
A. I am.
Q. Where were you living on the 4th of February, 1903?
A. At Orlando, Oklahoma.
Q. Of whom did your family consist?
A. I- consisted of my wife and little boy four years old and little girl about two.
Q. Where were you living in the town of Orlando?
A. I was living in the west part of the town.
Q. Describe your house and home?
A. The house 12 by 14——
63 Q. What?
A. It was a house 12 by 14 in size, divided into two rooms——
Q. Ain't you mistaken about that, Bert, that is one room?
A. One room is 12 by 14, yes sir, the other I believe is 10—it was divided into two rooms, the house was 24 feet one way, and 12 the other, 12 by 24, and it was partitioned into two rooms.
Q. How was the house built?
A. The house was built with weatherboard on the sides, and it was lathed with the expectation of plastering, but we didn't plaster, it, we put canvass on it, and then it was papered over the canvass.
Q. Speaking of your family, give their names.
A. My wife's name was Rosalie Deselms, and my boy's name was Fred S. Deselms, and he was named after my brother and my wife's brother, and the little girl's name was Genore.
Q. Are you the father of Fred S. Deselms and Genore Deselms?
A. I am.
Q. What was Fred's age?
A. He was four years old at the time of his death or about four years old.
Q. He of course was not married and left no widow?
A. No.
Q. The little girl was an infant, and she left no widow?
A. No.
Q. That is right, is it?
A. Yes sir.

Q. Tell the jury what kind of boy Fred was, his health, his mind, whether he was bright and active or otherwise?

A. Yes sir, he was healthy.

Q. I didn't hear you, did you say you can't tell that?

64 A. No.

Q. Do you know of the shipment to the firm of Powers & Deselms of three barrels of what was supposed to be coal oil about the last of January, 1903?

A. Nothing, not particular at that time, I am not posted on that.

Q. What was your business at the time?

A. I was clerking for Powers & Deselms, my brother and Mr. Powers.

Q. Do you know of the fact that oil was received about that time and put into their storage tank?

A. Yes sir, I know that they were out of oil about that time, and that they got in three barrels of oil. In fact, I was going to say I loaded one of them for Caywood, I won't be positive.

Q. Following that a day or two, state whether or not you pr-cured any of that oil for your family use?

A. I did.

Q. When did you do that?

A. It was on Sunday morning.

Q. What day of the week or month?

A. It must have been about the first, I believe, of February.

Q. What was the occasion of your getting it on Sunday?

A. I had been making preparation to go to Purcell as a member of the Grand Lodge, and had been calculating for a week or two of going there and made all preparations for it, and I brought down everything in the grocery line, as much as I could think of, and fetched things home for my wife to use while I was gone, but on Saturday evening she spoke to me about oil, but I forgot the can, and didn't take it up Saturday evening; she had filled up, I believe, what we called our big lamp, we had one big lamp that we used in our sitting room, she had filled that up with oil and emptied all the oil out of the can, and told me to get some more so she would have enough to use while I was gone, and I forgot it Satur-

65 day, and Sunday morning she called my attention to it, and I took my little boy and went up and got a gallon of that oil.

Q. Now what kind of can did you use?

A. I used a two gallon galvanized can.

Q. Was that the regular use that you put that can to?

A. Yes sir.

Q. You used that for coal oil?

A. Always used it for coal oil.

Q. Did you have a gasoline can?

A. I had one we used in the summer, it was laying over in my cave, I had a cave about 20 feet from the house, and kept my gasoline can down in that, and my gasoline stove was also in there; we weren't using gasoline at the time.

Q. About what time in the day Sunday did you get this what you supposed to be coal oil?

A. I don't remember exactly the time, sometime about—it was in the forenoon.

Q. Where did you get it from?

A. I got it from the store, Powers & Deselms, where I was working——

Q. From the storage tank?

A. Yes sir.

Q. From the regular coal oil storage tank.

A. Yes sir.

Q. About how much did you get?

A. I got one gallon.

Q. Where did you convey this oil to?

A. I took it home.

Q. What time did you leave home?

A. I left home I believe on the one o'clock train, I left home about 15 minutes till one, on Sunday.

66 Cross examination by Mr. WELLS:

Q. Where did Powers & Deselms keep their oil and gasoline in reference to their store?

A. Well, in reference to the store, their gasoline was kept in the gasoline house, it was back north, almost due north from their back door back next to the alley, but the coal oil was kept in the ware room north and east from their main store.

Q. Both kept in the storage tanks?

A. The coal oil was kept in an automatic storage tank in the ware room. The gasoline was kept in a 50 gallon—when they kept gasoline they kept it in a 50 gallon can in the little gasoline house off by itself.

Q. Who was with you when you got this kerosene?

A. My little boy.

Q. Anybody else?

A. No sir.

By Mr. HUSTON: Did you have any knowledge that that was a mixture of coal oil and gasoline?

A. No sir.

Q. What did you believe it to be?

A. I believed it to be P. W. Oil, I charged myself with P. W. Oil at wholesale price.

Q. Now, do you know anything about preserving some samples of the oil from that tank that you procured that gallon of oil from?

A. Yes sir.

Q. Who participated in taking out these samples and preserving them?

A. I cannot say exactly now who did, I know the initials were on the seals.

Q. Were you present?

67 A. Yes sir, I was present.

Q. Were those samples taken from the same tank that you got this gallon of oil from?

A. Yes sir.

Q. Was it part of the same oil?
A. Part of the same oil.
Q. How long afterward?
A. Well, I got it on Sunday, that was taken, I believe, I am not sure on dates, on that, whether that was taken Thursday morning or Friday morning afterward.
Q. The samples were taken after the fire?
A. After the fire, yes sir.
Q. Do you know what was done with those samples at first?
A. Yes sir, they were taken over to Mr. Cowman's and put in his drug store.
Q. And left in his custody?
A. Yes sir.
Q. Do you know what Mr. Cowman did with those samples afterward or some of them?
A. Well, he placed them on a shelf when we took them over there.
Q. I mean did he deliver them to any body?
A. Yes sir he delivered two bottles to me about one year afterward.
Q. What did you do with them?
A. I took them to Stillwater and delivered them to Prof. Holter.
Q. The professor of chemistry at the Agricultural College?
A. Yes sir.
Q. Turned them over into his hands?
A. Yes sir.

68 Mrs. JENNIE EMORY, a witness for the plaintiff, being called and sworn, testified as follows:—

Direct examination by Mr. HUSTON:

Q. State your name to the jury.
A. Jennie Emory.
Q. I am going to ask you to speak so the gentlemen there furthest from you can hear every word.
A. I will, if I can.
Q. What, if any, relation are you to Bert Deselms, the plaintiff in this case?
A. I am his sister.
Q. Where were you living in January and February, 1903?
A. At Orlando.
Q. What was your occupation then?
A. I was clerk in Powers & Deselms store.
Q. What relation are you to Fred Deselms?
A. I am his sister also.
Q. Of whom did your brother Bert's family consist?
A. Of a wife and two children.
Q. Give the names of the children.
A. Fred S. Deselms and Genore Deselms.
Q. How old was Fred?
A. He was four years old.

Q. Now tell the jury what kind of a boy Fred was, that is, physically, mentally, general health, etc.—(pause)—can't you tell?

A. No answer.

Q. Go on.

A. He was a bright little fellow and healthful, strong and robust, little fellow.

69 Q. How old is your brother Bert?

A. He is 33.

Q. Now?

A. I think so, 32.

Q. 32, that was two years ago, he was then 30 years old?

A. Yes sir.

Q. Do you know of your brother's going away from home about the last of the month of January, 1903?

A. Yes sir.

Q. State whether any arrangements were made for your staying at his house?

A. There was, he asked me to stay and look after his family.

Q. What evening did you go there first?

A. Sunday evening.

Q. Did you remain all night there Sunday night?

A. I did.

Q. Coming down on Monday or Tuesday?

A. I worked in the store and left at 9, and returned at noon, and returned at between six and seven each night and stayed with them.

Q. What day was it the fire occurred?

A. On Wednesday.

Q. And you stayed there Sunday night?

A. Yes sir.

Q. And Monday night?

A. Yes sir.

Q. And Tuesday night?

A. Yes sir.

Q. Now, on any of these evenings, state whether or not anything was done with the oil or mixture whatever it was, in that coal oil can?

70 A. The first night, Monday night, we didn't use any of it. because the lamps were full, and my sister in law got us a new lamp Tuesday, and that was the first we used of it.

Q. Just tell the jury what you did toward using it in the new lamp.

A. I filled the lamp and tried to use it on the machine to sew, it was a small lamp and I put it on the back of the machine so I might sew, and on filling it and setting it down onto the machine I looked up and a blaze was coming out of the flue, and it frightened me, and I turned it down and blew it out, I blew it several times before I extinguished the blaze, and I concluded that the wick hadn't been trimmed right, and I trimmed it and lit it again, and it did the same thing, and I set it out in the other room and didn't light it any more, thinking there was something wrong with the burner.

Q. Now coming down to Tuesday night, what kind of weather was it?

A. It wasn't very cold, Tuesday night nor Wednesday.

Q. Now then tell the jury how your family spent the evening Tuesday night, and about what time you retired?

A. We spent the evening sewing, I was intending to help my sister in law with her sewing while I stayed nights with her, and we were sewing and finally neglected to fix the fire, and when we looked at it it had burned so low that we either had to kindle it or let it go, so we concluded we would go to bed and let the sewing go that night.

Q. About what time in the evening was that?

A. Well, I should think that was about nine o'clock, somewhere near that.

Q. Now, at the time you went to bed, state whether or not there was any fire in the heating stove?

71 A. There wasn't much because we couldn't start it without kindling, and so we didn't replenish the fire.

Q. Let it go and went to bed?

A. Yes, sir.

Q. What were you burning in the stove, Mrs. Emory?

A. We were burning wood.

Q. Did you have any coal?

A. No, sir.

Q. Now describe that stove as to how it was arranged internally for the burning of fuel, that is, state whether it had a grate?

A. It was a coal stove and had a coal grate, it was a stove built on the order of the stove in here, only smaller.

Q. Now underneath the grate what was there?

A. There was a small ash pan.

Q. What time did you get up the next morning?

A. Rather late, it was a little late, I remember, it must have—close to seven o'clock.

Q. What was done first when you first got up?

A. I made a fire in the cookstove.

Q. In what room?

A. In the kitchen.

Q. Who got breakfast?

A. Well, we got breakfast together.

Q. Who did?

A. My sister-in-law and I.

Q. What time did you have breakfast that morning?

A. I ate breakfast between 7 and 8 o'clock.

Q. Who dressed the children?

A. Well, she started and I finished dressing them.

72 Q. Now, Mrs. Emory, did you observe the condition of the heating stove in the front or west room that morning?

A. Yes, sir, I went in to make the fire in it and my sister in law called to me that it was so late, to finish dressing the children and let the fire go and she would start one after breakfast.

Q. Now when you went to the stove with that purposes, what was the condition of the stove?

A. It was cold, there was no fire in it.
Q. Did you open the door?
A. Yes, sir.
Q. Did you see the ash pan?
A. Yes, sir, I opened the door and pulled the ash pan partly out, and seeing there was very few ashes in it, I pushed it back in?
Q. Was there any coals in the ash pan?
A. No, sir.
Q. What kind of ashes was it?
A. Just wood ashes, we had been burning wood.
Q. Was there anything in the body of the stove on top of the grate?
A. No, sir.
Q. Nothing at all?
A. Nothing but the wood ashes.
Q. And these little ashes you say were in the ash pan?
A. Yes, sir.
Q. And the stove was cold?
A. Yes, sir.
Q. Then when your sister in law made that suggestion, you then desisted from making a fire and went on dressing the children?
A. Yes, sir.

73 Objected to as leading, which objection was by the court sustained.

Q. Now, about what time did you leave the house that morning?
A. It was five minutes of eight when I looked at the clock and left the house and started to the store.
Q. What was the weather or what was the temperature that morning?
A. It was a pleasant morning, didn't seem to be very cold.
Q. Tell the jury whether or not later in the morning the temperature changed?
A. Yes, sir, the wind came up, I remember, and I had been in the stone building, and when I heard the cry of fire and went out the wind was blowing very hard.
Q. How long after you had reac. the store before you heard this cry of fire?
A. It was about two hours.
Q. So that the fire occurred about 10 o'clock?
A. Yes, sir.
Q. Did you discover where the fire was?
A. Yes, sir.
Q. Where was it?
A. In the southwest part of town.
Q. Well, what place?
A. My brother's house.
Q. The same house that you had been in and stayed in over night and left that morning?
A. Yes, sir.
Q. What did you do?

A. I ran to the fire.

Q. Did you see anything at the time except the fire, you didn't see the bodies at that time, did you?

A. I saw them before I left the scene.

74 By the COURT: Where were the beds located in the house?

A. One was in the southwest corner; the other one, the children's bed was on the north side of the house.

Q. Which side was the stove on?

A. It was on the east side.

Q. How close to the wall?

A. Well, I should say about from the edge of the platform to here.

Q. Three or four feet?

A. Yes, sir.

Q. How was the pipe attached to it, did it go straight up through the ceiling or into the side wall?

A. It had an elbow, if I remember right.

Q. And went into a flue at the side?

A. Yes, sir.

Cross-examination by Mr. SHARTEL:

Q. I believe you said you got up about 7 o'clock in the morning?

A. Yes, sir.

Q. The first thing you did was to build a fire in the cook stove?

A. Yes, sir.

Q. Where was the cook stove in reference to the heating stove?

A. The cook stove was in the kitchen, in the northeast corner.

Q. The kitchen was the east room?

A. Yes, sir.

Q. And where did that flue go to from the kitchen?

A. It went over to the same flue.

Q. Went into the same flue?

A. Yes, sir.

75 Q. What kind of a fire was there in the kitchen stove?

A. I built a wood fire.

Q. What kind of wood were you burning?

A. I don't know whether it was Oak or what it was, I know it was common wood.

Q. Was it green wood or dry wood?

A. It was dry wood.

Q. That is in the cook stove, what were you burning in the heating stove?

A. Burning the same wood.

Q. Cut up like ordinary stove wood or was it in chunks?

A. Yes sir, ordinary stove wood.

Q. Didn't burn any large chunks in the heating stove?

A. No sir, it was a coal stove and we happened to be out of coal, and were burning wood.

Q. At the time when you started to make the fire in the heating stove what did you do, did you put any wood or kindling in the stove?

A. I didn't put anything in it, I closed the door and went back to the kitchen.

Q. Just went and looked in the ash pan and looked inside the stove?

A. I was intending to clean out the stove and fix the fire.

Q. And you found no ashes in the fire box?

A. No sir.

Q. The ashes had all gone down through into the ash pan?

A. Yes sir.

Q. And you pulled the ash pan out and looked at the ashes?

A. Yes sir.

Q. And saw it wasn't full of the ashes?

A. Just a very few.

76 Q. And thought it wasn't necessary to empty the ash pan?

A. Yes sir.

Q. And at that time your sister in law told you not to bother about building the fire?

A. Yes sir.

Q. She would build it after breakfast?

A. No answer.

Q. And you stopped there?

A. Yes sir.

Q. Were you at the house there when the can of oil was brought there?

A. I was not.

Q. Where were you accustomed to keep this oil?

A. I can't say where my sister did keep it.

Q. Don't know where it was kept?

A. No sir.

Q. Whether it was kept in the kitchen or sitting room?

A. I suppose they kept their oil can in the kitchen.

Q. You don't know anything about it, whether she kept it in which room?

A. No sir.

By the COURT: Did you use it that morning to make a fire in the cook stove?

A. No sir, I used it the night before, and set it down by the stove.

Q. Used it in making a fire?

A. No sir, filling a lamp.

By Mr. SHARTEL: Where did you leave the coal oil can the night before?

A. I set it beside the wash stand in the kitchen.

Q. Where is the wash stand located in the kitchen?

77 A. On the west side of the kitchen, opposite side from the cook stove.

Q. Near the center?

A. No sir, on the side of the room.

Q. I mean near the west wall?

A. No sir, it is on the south wall, against the south wall.

Q. In what corner of the room did you say it was setting?

A. On the south side.

Q. South side of the room?
A. Yes sir.
Q. And where from the corner?
A. The wash stand set about center way.
Q. Center of the south side of the wall?
A. Yes sir.
Q. Of the kitchen?
A. Yes sir.
Q. Now where was the can setting in reference to this wash stand?
A. Setting right down by the side of it.
Q. Which side?
A. On the west side.
Q. How large a wash stand is that?
A. It is just an ordinary wash stand.
Q. Is it two feet long?
A. Longer, I should think.

78 R. H. BRADSHAW, a witness for the plaintiff, being called and sworn, testified as follows:

Direct examination by Mr. HUSTON:

Q. State your name to the jury.
A. R. H. Bradshaw.
Q. Where do you live?
A. Arkansas City.
Q. What is your occupation?
A. Operator.
Q. Where were you living on or about the 4th of February, 1903?
A. Orlando, Oklahoma.
Q. What were you engaged in there?
A. In operating, for the Santa Fe.
Q. Are you acquainted with A. B. Deselms?
A. Yes sir.
Q. Did you know Mrs. Deselms and the children?
A. Yes sir.
Q. Did you know where they lived?
A. Yes sir.
Q. Their house?
A. Yes sir.
Q. State whether or not you lived or roomed near there?
A. I was right near their place, our lot run back toward theirs; theirs joined ours in the same block.
Q. Do you know anything about a fire occurring at their house on that day?
A. Yes sir.
Q. About what time in the day was it?
A. It was between 9 and 10 o'clock somewheres about that time.
Q. Do you remember that day?
79 A. Yes sir.
Q. What was the weather or temperature?
A. In the morning it was rather fair, but about between eight

and nine, the wind became very strong from the northwest and got quite a good deal colder.

Q. What first attracted your attention to the fire at the Deselms home?

A. I was just in the act of going to bed when the smoke rolled out over our barn, and I ran out and just as I got to the barn I readily seen it was over in Mr. Deselms' house.

Q. What did you then do?

A. I kept on going toward his house.

Q. Were you the first one there?

A. Yes sir.

Q. When you got to the house what did you do first?

A. I tried to get in and broke in the back door and in the kitchen door.

Q. Did you enter the kitchen?

A. Yes sir.

Q. Now, what did you discover there?

A. I discovered that there was a dense fog or smoke in there, which seemed to have a gas smell, something stronger than I could go into.

Q. Was it smoke or gas or smoke and gas?

A. Smoke and gas mixed.

Objected to as leading—sustained.

Q. You may just state now what it was you observed in the room.

A. I observed that there was a strong odor of gas and smoke so dense that I couldn't enter and I got part way and come out, had to come out, and tried it again and didn't get in I don't suppose as far as I did the first time, and came out again.

80 Q. What was the effect of that upon you?

A. Choking me down the worst kind.

Q. After retreating the second time from out the room, what did you do?

A. I ran around the house and tried to get in otherwise.

Q. How long was it until others came?

A. Probably three or four minutes.

Q. Did you remain there?

A. Yes sir.

Q. Did you know at that time whether or not there were any human beings in the house?

A. I did not.

Q. When did you discover that?

A. When did I discover there were human beings in the house?

Q. Yes sir.

A. As soon as we could see them.

Q. How soon could you see them?

A. As soon as the fire began to make it light in there, when the smoke rolled away we broke in the windows, and we could see a body lying by the stove.

Q. How many bodies did you see there, Mr. Bradshaw?

A. Three in the house.

Q. What were those bodies?

A. The wife of Mr. Deselms laid by the stove, the little boy on bed and the little girl on the couch.

Q. What was their condition?

A. Their condition was when we seen them, burned, the wife most to a crisp, part of the little boy's face was saved on account of being under the cover or in his hand, I don't know which, and the little baby, there was nothing left to speak of that you could identify it.

81 Q. That is when they were taken out?

A. Yes sir.

Q. Could you see them through the flaming sides before they were taken out?

A. You could see the wife, and finally we seen the little boy before we took them out.

Q. Were they dead?

A. Yes sir, dead.

Q. Now as to any other things you observed theee, what else did you see?

A. I seen an oil can.

Q. Where was the oil can?

A. The bottom part of it was to the southwest of her.

Q. Was there any other part?

A. The top part was to the northwest on this side of her.

Q. In describing that top part, explain more fully to the jury what you mean by the top.

A. I mean where it tapers up, it has a shoulder. and from there on up the whole thing was blown off from the body of the can.

Objected to—move to strike out the last part of the answer of the witness.—which motion was by the Court sustained to which the plaintiff excepted.

Q. How far apart was this bottom of the can from the top, the body of the can from the top?

A. I should judge it was about four feet, probably five, yes, it was further than that.

Q. Well, how far?

A. I should say five feet at least.

Q. State whether or not you observed the stove?

A. Yes sir, I did, the top of it was blown off.

Defendant moves to strike out the answer of the witness as
82 not responsive, and as stating a conclusion, which motion was by the court sustained, to which the plaintiff excepted.

Q. Well, describe the location of the stove.

A. The stove, as near as I can remember, was near the partition south room, south part of the room, and when we could get to it it had settled down, leaning to the northwest.

Q. Did you observe the door of the stove?

A. Yes sir.

Q. What condition was that?

A. The top hinge had been blown off——

Objected to—move to strike out the statement of the witness,—which motion was by the Court sustained.

Q. You can't state how it come off——
By the COURT: You didn't see it come off, did you?
A. No sir.
Q. State what you saw there, and not what you didn't see.
A. The top hinge was off, the door hanging upon one hinge.
By Mr. HUSTON: Did you observe the contents of the stove?
A. Yes sir.
Q. Tell the jury what was observed inside.
A. Inside the stove on the grate was paper, cobs, kindling, and browned sticks of wood.
Q. What was the appearance there?
A. The appearance as though it had slightly been burned, just chared over a little.
Q. Was there any fire in the stove at all?
A. Not at all, when I seen it.
Q. In the first place, Mr. Bradshaw, how far from the stove was the body of Mrs. Deselms?
A. Her feet were right near the stove.
83 Q. And which way was her body laying?
A. Laying toward the northwest.
Q. Now where was this body of the oil can from the stove?
A. It was to the southwest.
Q. And where was the top of the oil can from the stove?
A. Northwest.
Q. Where was the body of Mrs. Deselms in reference to the body of the oil can and the top of the oil can?
A. She was between the two.

Cross-examination by Mr. SHARTEL:

Q. Which way did the door of this stove face?
A. It faced toward the west.
Q. The stove set near the east side of this west room?
A. Yes sir, I believe it was near the east.
Q. You stated a moment ago it was near the south side, did you mean that?
A. I didn't mean that, I meant the east.
Q. Now the stove opened toward the west?
A. Yes sir.
Q. Where was the door, right in the middle of the boiler plate section that goes around the stove?
A. Do you mean up and down?
Q. Yes sir.
A. I couldn't say as to that, whether there was more above the top of the door or more below.
Q. The stove mounted on two hinges?
A. The stove door had been, yes sir.

Q. Ordinary cast iron hinges with pins in them?
A. Yes sir.
Q. How was it broken, what kind of a fracture?
84 A. How was it fractured?
Q. Yes.
A. I think the part with the pin run down through was broken off.
Q. The lower or upper hinge?
A. The upper hinge.
Q. Did the door have a latch on it?
A. I don't remember as to that.
Q. Was the top on the stove at the time you saw it?
A. No sir.
Q. When in reference to the fire was it when you made the examination?
A. As soon as we could get into the stove.
Q. How long after the fire was started?
A. Why, it was probably forty minutes, I should judge, maybe longer, time went rapidly.
Q. The fire burned out in the meantime?
A. Except what we put out with water.
Q. You put out some of it with water?
A. Just a little around the body of his wife.
Q. And was the fire still burning when you made this examination of the stove?
A. Yes, sir, there was some pieces of wood burning around there.
Q. Was the whole building consumed there in 40 minutes time?
A. No sir, some few pieces burning yet.
Q. And did you go in to the stove, where the stove was standing, to make this examination?
A. Yes sir.
Q. Had the floor burned through?
A. The floor had burned through most all places.
Q. The stove had gone down through the floor onto the ground?
A. The stove had settled, yes sir.
85 Q. And gone down with the floor?
A. Yes, sir.

Rev. PAUL J. EVEREST, a witness for the plaintiff, being called and sworn, testified as follows;

Direct examination by Mr. HUSTON:

Q. State your name to the jury.
A. Paul J. Everest.
Q. Where do you reside?
A. I reside at Lamont, Oklahoma.
Q. What is your profession?
A. Minister.
Q. Of what church?
A. Methodist church, pastor Methodist church, Lamont.
Q. Where were you residing in February, 1903?

A. Orlando, Oklahoma.
Q. Were you the pastor there at the time?
A. Yes, sir.
Q. Are you acquainted with Mr. A. B. Deselms?
A. Yes, sir.
Q. Do you know his family, wife and children?
A. Yes, sir.
Q. What was his children's names?
A. I don't know their full names, the boy was called Fred and the little girl Genora.
Q. Did you have an opportunity to see the children frequently?
A. Yes, sir, they were at my house about as much as they were at home, I think, a good part of the time anyhow, through the day?
Q. Tell the jury what kind of a boy Fred was as to his health, physically and mentality, was he a bright boy, etc.?
A. He was an average boy for intelligence, I never noticed anything particularly above the average in brilliancy; he was
86 very robust, active little fellow, I don't think I ever knew him to be sick, he seemed always to be in perfect health; he was a very lively little fellow.
Q. Now, the little girl, just state——
A. The little girl was a sweet little thing, beautiful little girl about two years old. I never knew of her being sick; she seemed to be a very ordinarily healthy child.
Q. Were you at home in Orlando on the fourth of February, 1903?
A. Yes, sir.
Q. Do you know of a fire occurring at the Deselms home?
A. Yes, sir.
Q. What attracted your attention to it?
A. Well, there was some one, I don't know whom came and rapped on the door; my wife was sick at the time, our baby was only a few days old, and I had been up a good part of the night before, and we had a north door, and had a quilt I think or robe or something hanging up over it to keep the wind from getting to my wife, and the shades were down, and I was sitting there about half asleep in the chair and some one came and rapped on the door, and I asked them to please go to the other door, I got up and in going to the other door I had to pass through the kitchen, and the shade was up and I looked out and saw the smoke bursting out of the building, I says, to the nurse, take care of my wife, Deselms' house is afire, and don't let Mrs. Everest know it, it would excite her, but she did however, discover it, and I ran out then, and Mr. Scott, I think was the first man I met, and we ran over to the building, and I saw that it was—then when I first discovered it the smoke was bursting out at the west gable end and around the comb of the building, or roof, and we ran up to the building, and it never dawned on my mind of anyone being in there, and we ran up to the
87 building, and I think some one, I don't know who it was, burst in the west window; everything was dark until that

window come out; I didn't notice any flames at least until that glass window was broken in, and then everything seemed to be ablaze, and we looked in and saw something in there, a form, I couldn't tell what it was, I just got a glimpse of it, but I saw there was something laying on the floor.

Mrs. Emory had come up from the store, and came to me and says, Where is Rose and the children; that was, however, before we burst in this window, that was as we went over to the building, she came up and says Where is Rose and the children, that was the first time it dawned on my mind of their being in there; it was in the day time, and I supposed naturally that they had been out, and so I says: If you don't know, who in the world does know? Then we ran up and some one burst in that window, and everything just seemed to flash up in a blaze, there might have been a blaze before for all I know but I didn't notice it until the window was burst in, but then we saw something there, I just got a glimpse of it, it might have been a log, I just seen the form laying there, and I decided that it was a person; we ran around then on the north side and some one, I don't know who, burst in a part of the north side, it was just a shell, the house was, and so it was easily burst in, it was just weatherboarded, wasn't finished inside, and they burst a part perhaps as much as a doorway and we could look in then and saw her very distinctly, lying there on the floor and we could see a child here on the bed and another one on the lounge over here.

Q. Were the bodies removed?

A. The bodies weren't removed at that time, we couldn't get to them, and the building burned almost like a paper house, it was just a shell, and the roof just seemed to be practically just
88 hanging together, it was almost consumed when we pushed the building over, I helped to do that, I don't know who else helped, but I know someone had a pole there and we put the pole against the building and pushed it over, and it fell over then, and then we turned a hose on, they had run up with a tank of water in the meantime, and we turned the hose on, I am not positive, but I think some boards were laying down that we walked out on as we turned the hose on the embers, and took a celler door or some kind of a door and got the body of Mrs. Deselms on that door and carried it out. We had a long iron hook that we run in and got the springs of the bed and pulled it out at the other end with little Fred on it. I couldn't say how or who got out the other body. The first I knew it was out, I don't know who got it.

Q. Now, Mr. Everest, did you observe the condition of things in the room?

A. Yes, sir.

Q. Tell the jury what you observed in there?

A. Well, I had no thought of course of anything of this kind, but I wanted to satisfy my own curiosity as to how it happened, it was a horrible thing to me——

Objected to as incompetent, which objection was by the court sustained.

By the COURT: You are not permitted to comment, just state facts.

A. Well, I saw in the building where she had lain, in fact, before they took her out, I discovered this fact, that she was lying—the stove was setting here, Mrs. Deselms was lying
89 here with her feet toward the stove and her head to the southwest, and there was a can laying over here, the body of the can and the top of it was on the other side of her and the stove, the floor had burned through and the stove was in a slanting position, the top was gone from the stove, and the door or top hinge was broken, it was hanging by the bottom hinge, the door was open and hanging down by the bottom hinge, and in the stove, we examined it very closely, there might have been, I think there was, some little debris in the stove on top of the wood, but there was some wood and some cobs and on the grate underneath there was some paper. This was all slightly scorched, I can't say it was really charred, but scorched.

Q. Was there any fire going on in there then?

A. In the building?

Q. In the stove?

A. No, sir, there was no fire in the stove.

Cross-examination by Mr. SHARTEL:

Q. How long after the fire started or after you got there was it until you arranged to make this examination of the stove?

A. I couldn't say, everything was excitement, I couldn't tell, it wasn't very long, the bodies were taken out and gone somewhere, I couldn't say positive where they took them, they had gotten the bodies out and taken them away.

Q. Had the building been pushed over or fallen in in the meantime?

A. Yes, sir, it had been pushed over, what there was left, the most of it was consumed by the fire before it was pushed over, it was principally burnt wall standing.

Q. What became of the roof did it remain in position or fall in?

A. A portion of it was consumed.

90 Q. What became of this partition between the two rooms?

A. I don't know whether it was consumed or what became of it, I didn't see anything of it.

Q. Did you hear any explosions after you went there?

A. No sir, well after we went there there was some cartridges exploded I think in his bureau drawer or somewhere there, I heard those reports of those cartridges.

Q. Did you hear any other noise?

A. No sir.

Q. Or explosion at the time?

A. No sir.

Q. It sounded to you like a cartridge?

A. Yes sir.

Q. How many explosions of that kind did you hear?

A. Oh, three of four.

Q. Was any part of this partition between the two rooms standing when you made this examination of the stove?

A. No sir.

Q. All gone down?

A. Yes sir.

Q. What was it, a studding partition?

A. I hardly think so, I think it was just boards set up.

Q. Just a light partition?

A. I think so, I couldn't say positive as to that, I was in the house quite often too, but I never noticed particularly.

Q. How close were you to this stove when you made this examination?

A. I was right up to it, I couldn't say exactly how close I was to it.

91 Q. Did you pick up any part of this oil can and handle it?

A. I am not positive, I hardly think I did, I don't think I had it in my hands.

Q. Did you examine the edges of the metal?

A. No sir.

E. E. COWMAN, a witness for the plaintiff, being called and sworn, testified as follows:

Direct examination by Mr. HUSTON:

Q. State your name to the jury.

A. E. E. Cowman.

Q. Where do you reside?

A. Orlando.

Q. What is your business?

A. Druggist.

Q. How long have you been engaged in that business at Orlando?

A. Five and one half years.

Q. You were living there then on the fourth of February, 1903?

A. Yes sir.

Q. Do you know this plaintiff, Mr. Bert Deselms?

A. Yes sir.

Q. Were you acquainted with his family?

A. Yes sir.

Q. Of what did his family consist?

A. It consisted of a wife and two children.

Q. Did you know of a fire at their home on the fourth of February, 1903?

A. Yes sir.

Q. How was your attention attracted to the fire?

92 A. Well, I was at the store at the time, and people were running off that way, some hollowing fire, and I understood from those passing it was Mr. Deselms' home that was afire.

Q. What did you do then?

A. I ran up with the rest of the crowd that was going up, there was a great many going up at the time.

Q. What progress had been made by the fire when you reached there?

A. When I got there they were trying to break in on the north side, trying to break into the house; the house was smoking all over, and I think there was some flames on the outside at that time, and probably on the northwest corner; I came in from the north where the flames were, and saw the flames appear at the northwest corner.

Q. After you arrived there, did you remain and participate in what work or efforts were being made?

A. I was there until two of the bodies were taken out, and something, I forget what it was now, I think I went to attend to some 'phoning to Marshall, if I remember right.

Q. Did you observe the condition of the interior of the house?

A. I did afterward, yes sir.

Q. How soon?

A. Well, I came back, they had gotten the other body out then, the body of the small child, and the fire was practically out, that is, there was a great deal of smouldering around there, and some blaze here and there, but the big part of it was out, and I with some others examined the premises there.

Q. What did you discover?

A. Well, I discovered that the stove was setting there in the room as it had been and was in rather bad shape.

Q. Just tell the jury what was the shape of the stove.

A. The stove was setting in a slanting position, it had gone
93 through the floor, although I think the floor was almost on the ground, I think the floor was almost laid on the ground and no under-pinning under it much, and it had to go but very little to set right on the ground, and setting in a position, leaning a little bit to the north and it was in a dilapidated condition——

Q. Describe in what way it was dilapidated.

A. The door was hanging on by the lower hinge, the top was open, I couldn't say whether the top was clear off or whether the lids were all off and simply,—at any rate it was open. We noticed the stove, it still had the wood in it and had some kindling in it, I don't think the kindling was very small, it had some paper in the bottom, but the wood was there and seemed to be scorched some, and in looking around there I noticed the oil can was on one side and the lid—at first I didn't see the lid——

Q. You mean the lid of the oil can?

A. The lid of the oil can.

Q. Was it the lid or top?

A. Well, it was the top, the top part of the can, it was found however, close to the stove, and the oil can was also setting there close to the stove or laying, I don't remember which it was.

Q. After the fire do you know of any examination being made of the coal oil or supposed coal oil at the Powers & Deselms storage tank?

A. Yes sir, there was samples taken out.

Q. State whether or not you participated in taking out the samples?

A. Yes sir, I participated in it; there was I think, about 12 of us took samples from this tank,—some of us took,—some of the
94 bottles were filled from the upper part of the tank, and some were filled from the lower part. They were half pint bottles, we filled them and sealed them with plaster paris seals, cut strips of paper and each one of the parties there were engaged in it put their initials on this strip of paper, and one man put his whole name on the paper, and the bottle was corked, and the cork driven in and the strip of paper put across it and filled in with plaster paris, so that the seal was made of plaster paris on the top and then mucilage was stuck on the sides so that it came down over the bottle on the sides about midway down on the bottle.

Q. What was done with those bottles after they were filled and sealed in that manner?

A. They were taken to my store.

Q. Where were they placed first?

A. We first placed them on the shelf inside the store, pretty well to the back of the store.

Q. Well, what then?

A. And in probably about 20 minutes it might have been half an hour, one of them exploded and then——

Q. How far were they from the stove in the room?

A. Well, it was about 7 or 8 feet, maybe not over 5 feet behind the stove and to the side of the room, the stove sets in the middle of the room as to its width, and this was about 15 feet or about 12 feet west of the stove, and probably three or four feet south of the stove where these bottles were located.

Q. So that the whole distance now from the point where the bottles were located to the stove in the room was about how far?

A. I think about 15 to 18 feet.

Q. What was the temperature of the room at that time?

95 A. Just ordinary temperature, I judge it was along about 75, maybe not quite so warm, I couldn't say.

Q. What was done with the remainder of the bottles then?

A. I took them then and set them down in the cellarway, into a window in the cellar, the cellar is under by ware room.

Q. Did they remain in your custody from that time on?

A. Yes sir.

Q. What did you do with them?

A. Mr. Deselms called and got two of them, I can't say exactly when it was, I didn't take any note of the date, but it must have been year ago, may be not quite that long, maybe only six or eight months ago.

Q. Those you delivered to him, what condition were they in as to seals?

A. They were just the same as they were when they were put there. There was one of the remaining bottles that had bursted after taking them off the shelf, I don't know when that was done, I just simply know it was cracked up and the contents were gone, I don't know when that happened, whether it was done at once after

I took them off the shelf and put them down there or whether it was done later, I couldn't say.

Cross-examination by Mr. SHARTEL:

Q. How long after the fire were those samples taken?

A. Well, couldn't say whether it was the next morning or the morning afterward, it was taken in the morning, I think the following day, taken along about 9 o'clock.

Q. How long after you first got there was it, at this fire, until you made this examination of the stove and the premises that you spoke of?

A. I judge it was close to an hour, maybe not quite so long, I couldn't say exactly.

96 Q. Still hot around there was it?

A. There was still smouldering pieces of lumber around there.

Q. Did the stove give any indications of having been heated, or was it hot at the time?

A. I don't think there was any indications of its being heated at the time, no.

Q. Had there been any water poured on it?

A. No, I don't think there was.

Q. Had you seen them using the hose there?

A. They had a tank of water there and ran it out with kind of a hose, running it through the hose, the hose was connected onto the tank, and they would fill buckets, and I think they used the hose to run it out.

Q. Well, they threw the water on the fire there, didn't they?

A. There is no force from those hose, simply from the tank.

Q. I am not talking about the force, was the water generally applied?

A. Yes sir, they threw water, not so much on the general fire as they did for instance on the bed and things of that kind that they had gotten out with the bodies on.

Q. Can you say whether there had been any water used around where this stove was located?

A. I don't think there had, I wouldn't say positively, because I wasn't there all the time.

Q. And you think the stove wasn't warm at the time you saw it?

A. Well, it might have been warm, everything was warm around there, I know it wasn't hot.

Q. You spoke of this bottle exploding, what kind of f-acture did it make in the bottle?

A. Well, it made a fracture running about pretty near all the way down the side of the bottle and a piece, say probably that
97 size, that was blown out, it wasn't only cracked, but there was a piece blown out, it didn't blow the piece any distance, or anything.

Q. Did it make a loud report?

A. Well, not as loud as a gun, but it made a pretty good sized report, I knew it at once, as quick as it was done.

Q. What kind of a receptacle did you get this oil from?
A. Got it from the tank, I don't know, probably three or four barrel tank, I don't know how much it did hold.
Q. How did you take the oil out of it?
A. There was two ways, we got it from the top, part of it——
Q. How did you get that oil from the top?
A. I believe it was dipped into a funnel.
Q. Did it have a lid on top?
A. I think so.
Q. Simply reached in and dipped them in?
A. I think so.
Q. How did you get it from the bottom?
A. They had a spout that they drew it from.
Q. The ordinary spout where they drew off oil at?
A. Yes sir.
Q. That is in the bottom of that tank?
A. Yes sir.

R. S. SCOTT, a witness for the plaintiff being called and sworn, testified as follows:

Direct examination by Mr. HUSTON:

Q. State your name to the jury.
A. R. S. Scott.
Q. Where do you reside?
A. Orlando.
98 Q. What is your business?
A. Lumberman.
Q. How long have you been engaged in that business at Orlando?
A. About five and one half years.
Q. You were residing there then on the fourth of February, 1903?
A. Yes sir.
Q. Were you acquainted with the family of the plaintiff in this case, Mr. A. B. Deselms?
A. Yes sir.
Q. Do you know of the fact of a fire occurring upon that day when his house and family were burned up?
A. Yes sir.
Q. State whether or not you were there at the fire?
A. I was right there while the fire was in progress, it was just I think about bursting through in some places, around the upper part of the house.
Q. Well, just tell the jury what you did and saw.
A. I remained there until the house was pretty well consumed. I remained there until the fire had progressed so that there—because of some siding being removed by the persons there, or had burned itself off, I don't now recollect, but I could see through between the studding. I saw the body of the wife lying in front of the stove, and almost immediately thereafter I left to assist a relative away to my home, and then returned. The building was then down. The bodies of three persons had been removed, the people were pouring water around the edges, around where the walls had stood; the

heavier peices of dimension lumber seemed to be still burning, and they were throwing water where the material had seemed to fall in back, and it was still burning.

99 Q. Now, did you make an examination of the immediate premises there?

A. I did.

Q. Tell the jury what you observed?

A. As soon as it was cooled sufficiently to go in to what had been the enclosure of the house, I went in there; I found the oil can, the main portion of it——

Q. What portion?

A. The body of the can, and looked for the top of it. I didn't at first see it or recognize it, but called for it, if anyone could see it; some one, I think one of the young persons there said, Why this is it, Mr. Scott, this is the top of the can, I——

Objected to as hearsay——

Q. You can't say what was said, what did you do and what did you see?

A. I took the top of the can in my hands and looked at it and it was battered, I won't say battered, but it was disfigured. I wasn't satisfied that it was the top of the can until I brought the two parts together, that is, took the top of the can and the body of the can, I was then satisfied that it was a portion of the can.

Q. Where was that top when you first saw it, when your attention was called to it?

A. The top laid a distance, somewhere I should judge from three to five feet from the stove in a west and northerly direction, almost, I should think, northwest.

Q. Where was this top piece?

A. That was the top piece.

Q. Where was that from the body of the can?

A. It was not northwest from the body of the can; the body of the can set south or in a southerly direction from the stove.

100 Q. How far apart was this body and this top?

A. As I recollect it not probably more than seven or less than four or five feet.

Q. Now speaking of the body of the can, tell the jury what all that consisted of, and the condition that that was in?

A. The body of the can was blackened, it was quite black, that is about all——

Q. What do you say in reference to the bottom of the can?

A. As to the bottom, I am not clear, but my recollection is that the side or the main body and the bottom were together, that I will not be positive of, but my recollection is that they were.

Q. Now, what further did you observe as to the stove, for instance?

A. I observed that the stove was in a demolished condition.

Q. State more fully, that is a conclusion?

A. The stove was—the lower part of it was a metal bowl——

Q. A little louder.

A. The bottom of the stove was metal, the other part of it was

composed of sheet iron; the front door way of the stove, the door and the frame were of cast iron, had been; the metal portions were broken up, badly shattered, shattered as if from some force from within.

Defendant moves to strike out the answer of the witness as a conclusion——

By the COURT: The motion will be sustained as to "as if from some force from within."

By Mr. HUSTON: Mr. Scott, describe the appearance and condition there instead of giving your own conclusion, describe the appearance of the shattered part of the stove which led to the conclusion.

101 Objected to as incompetent, irrelevant and immaterial, and calling for a conclusion, which objection was by the Court sustained, to which the plaintiff excepted.

Q. State the facts.

A. I recollect that at least one portion of the metal part of the stove was hanging outwardly from the rest, I am clear as to that; there may have been other portions that presented the same appearances, but I remember that at least one considerable portion of the metal part hung outwardly.

By the COURT: Which do you designate the metal part——

A. The casting—the stove is in some particulars like that one there, the door or doors being set in a metal frame.

Q. It is all metal, isn't it, you mean in a cast frame?

A. Yes, sir, I always refer——

Q. I know, but your reference don't make it very plain to somebody else that might not hear you.

A. I refer to the frame and the doors as being of cast iron, or as I term it, metal.

By Mr. HUSTON: You distinguish sheet iron from the cast iron by calling the cast iron metal?

A. Yes, sir.

By the COURT: You say you saw the top of that can?

A. Yes, sir.

Q. Do you know what was done with that?

A. I don't know what was done with it after I looked at it.

Q. Where did you see it last?

A. That was the last time I remember of seeing it, that is when I took it from somebody else's hands and tried to see whether it was part of that can or not.

Q. That was at the fire, at the burned place?

102 A. That was right at the time, as soon as it was cooled enough to get in there.

Q. Do you know whether any one did preserve it or not?

A. I don't.

Cross-examination by Mr. SHARTEL:

Q. You say you distinctly remember that one part of this cast metal was hanging outwardly?
A. Yes, sir.
Q. What particular part was that?
A. I don't recollect.
Q. Was it the door itself?
A. I don't recollect.
Q. Don't remember whether it was the door or part of the frame?
A. I do not.
Q. All you have is simply an impression that it was one part of that door combination there that was hanging out?
A. At least one part.
Q. You don't recollect the fact of one of the hinges being broken on one of the doors?
A. I do not.
Q. What about the top of the stove?
A. To what part do you refer as the top, do you call the top?
Q. I call the top the top, the part that goes over and has a lid in it, I suppose?
A. I have no recollection of that part of it at all.
Q. You don't recollect noticing that?
A. I don't recollect examing that, no, sir.
Q. You spoke of part of the stove being sheet iron, was it sheet iron or sheet plate iron?
A. No answer.
103 Q. Was the body of the stove then like stove pipe iron or was it plate metal, something like the stove here in front of us?
A. The top part from the bowl up was a composition similar to that, I suppose.
Q. Plate metal?
A. I don't so designate it as plate metal.
Q. Well, is it as thin as paper or one eighth or a sixteenth of an inch thick?
A. It is what I have always denominated sheet iron or sheet steel.
Q. I want to get at this proposition, was that stove made of ordinary sheet iron like a stove pipe of that thickness, or was it thicker or heavier?
A. I judge it was heavier and better quality of sheet goods than a pipe would be, it was heavier I would think, but it wasn't a cast iron piece, the front part, the frame for the doors and the doors were cast iron.
Q. It was either sheet or plate, that body, though?
A. The body was either sheet iron or sheet steel.
Q. Did this building collapse or any of the timbers fall in?
A. It hadn't when I left, and I was gone about twenty minutes, I think.
Q. Now, in this debris, there in the west room, were there pieces of rafters, and pieces of studding around there among the debris?

A. At what time?
Q. When you got back?
A. There were some unconsumed pieces, yes, sir.
Q. Timbers that had been in the building and had gotten down into the west room?
104 A. There was some of not very extensive size; the building was quite completely consumed, unusually so, I thought.
Q. Did you examine the interior of the stove to see what was in it?
A. Yes, sir.
Q. What was in it?
A. I found some wood, some round pieces of wood, perhaps two to two and a half or possibly three inches in diameter, scarcely that though, I would think, some split pieces made from such size round wood.
Q. Anything else?
A. Something that looked like some kind of kindling, as to what it was *L*——
Q. Was there any evidence there of fire having burned any part of that?
A. Not in the bottom part——
Q. In the bottom part of it——
A. In the lower part of this fuel in there.
Q. Was there in the upper part?
A. It was slightly scorched.
Q. Did you see any paper?
A. I don't recollect now that I did. There was something in there, of a very coarse quality.
Q. You couldn't see where there was any marks of fire on the bottom part of this material in the stove, but the upper part had just been scorched, is that correct?
A. That is correct, as near as I can recollect.

105 GEORGE L. HOLTER, a witness for the plaintiff, being called and sworn, testified as follows:

Direct examination by Mr. HUSTON:

Q. State your name to the jury.
A. George L. Holter.
Q. Where do you reside?
A. Stillwater, Oklahoma.
Q. What is your proffession?
A. I am professor of chemistry and metallurgy in the Agricultural College.
Q. At Stillwater?
A. At Stillwater, Oklahoma, yes sir.
Q. How long have you been engaged in that work, Professor, at Stillwater?
A. Thirteen years at Stillwater, nearly thirteen years, within about a month of thirteen years at Stillwater.
Q. How long have you been engaged in the study of chemistry?

A. I took up the study of chemistry three years before I was graduated, I was graduated in 1886, and have been engaged in chemistry either as instructer, analytical chemist and professor ever since.

Q. Now in your work as a chemist, have you had experience in analyzing oils and fluids, in discovering their properties?

A. I have had considerable experience as an analytical chemist but have never made a complete analysis of petroleum or even a complete analysis of kerosene, but I have each year and have had for the last ten years, my students make an examination of the kerosene that is sold here in the Territory as to its specific gravity and flashing point.

Q. Under your direction?

A. Under my direction.

106 Q. What are some of the various products of petroleum?

A. Well, they are variously stated, they are all arbitrary expressions or most all; some authorities will simply designate them as napthas, illuminating oils and lubricating oils, and these are further subdivided, that is an arbitrary subdivision.

Q. Are you acquainted with Mr. A. B. Deselms, the plaintiff in this case?

A. Yes sir.

Q. State whether or not Mr. Deselms brought you any samples of a fluid and delivered the same to you?

A. He did.

Q. State when that was?

A. On the 9th of March, 1904.

Q. What condition were those fluids in as to their receptacles, when they were delivered to you?

A. They were in two bottles, what you might term, I suppose, pint bottles, the bottles had in them ordinary cork stoppers and over the top of the cork or stopper was—the stopper was pushed down into the neck of the bottle, and over the top of that was, I should judge, what was plaster paris, I didn't analyze it to find out what, and over that and extending down on either side beyond the neck was a piece of paper in each case.

Q. Was there anything written on those pieces of paper?

A. As I recall it there were names or initials, possibly both.

Q. Did you preserve those?

A. I did.

Q. Have you them with you?

A. I have.

Q. Produce them please.

A. Witness produces same.

107 Q. This is sealed, were they placed then in this envelope and the envelope sealed?

A. They were placed there on the 15th day of March, the day *L* began the work; I did my work on the 15th and 16th, and put them in that envelope and sealed them the day I opened them.

Q. Have they remained there ever since?

A. They have remained there ever since.

Q. Please open the envelope yourself.

Witness opens envelope as requested.

Q. Is that the paper extending over one bottle?
A. This is apparently the paper, I don't see how it could be anything else other than that after I put it in there, it has never been taken out.

Here the same is marked for identification Exhibit "D."

Q. State whether or not this is the paper over the top of the other bottle?
A. This is the paper which was over the top of the other bottle as far as I can tell; when it was handed to me it was torn about half in two, I had to soak the paper in water to get the mucilage off the side of the bottle, and in taking it off I tore it entirely in two, but these two pieces go together.

Here the same is marked for identification Exhibit "E."

Q. After removing the corks, professor, state whether or not you made an analysis of the contents of either?
A. After removing the stoppers, I poured all of the material into a large baker and mixed it thoroughly, although I was informed by Mr. Deselms——

Objected to as hearsay, which objection was by the Court sustained.

Q. What further did you do?
108 A. I then took the specific gravity of the material.
Q. What did you learn that to be?

Objected to as incompetent, irrelevant and immaterial, no proper foundation having been laid, not having shown the identity of the liquid as the liquid sold, which objection was by the Court overruled, to which the defendant excepted.

A. I found the specific gravity of the material to be 45.1 Baume, after being corrected for changes in temperature.
Q. State whether or not you applied the flash test?
A. I took some of the material and applied the flash test.
Q. Tell the jury what those tests showed?
A. There are various methods of making a flash test; I didn't have the apparatus that is official in the Territory. The apparatus that I used is Abells tester, an English machine, I believe, and I determined the flash test with this piece of apparatus. I took it first at just the normal temperature at which I found it.
Q. What was that temperature?
A. That was 66 degrees, and I got a flash——
By Mr. SHARTEL: Wait, I want to ask the professor a preliminary question. Was that an open or closed tester?
A. I will explain that, Mr. Shartel, the difference between the two—this was a closed tester, yes sir.

Objected to as to the evidence of the flash test, the statute requiring the use of an open cup tester.

By the COURT: I think the matter of investigation might ascertain what the fluid was and the character of it, whether it was a statutory method or not.

To which ruling the defendant excepted.

By Mr. HUSTON: I will ask you first, professor, to state whether there would be any difference, and if so, of what character, between the test made by the open cup tester and the closed cup tester?

109 A. The closed cup tester is supposed to more nearly meet the conditions that are found in an ordinary lamp, and the flash test is necessarily then much lower than the open cup tester; authorities differ on the number of degrees, and I find them ranging all the way from five to twenty-five degrees difference in flash tests in the open and closed cup tester.

Q. Well now, proceed and state what was the flash test of that fluid that you had?

A. I lowered this fluid to 60 degrees by putting in cold water in the proper place, and lowered in for some new material, of course, and lowered it to 60 degrees and still got a flash, counting for 20 degrees difference would have given me a flash in the open cup at say 80 degrees; I didn't lower it below that point.

Q. Now, did you make an analysis of the fluid?

A. I made a fractional dissolution of it, to find if it had any light material in it to account for this low flash test.

Q. What did you discover, what was the result of your analysis?

A. I took 400 cubic centimeters of the material and put it in a fractional distilling flask and put this distilling flask on a sand bath, and covered up with sand and connected it with a condenser, the condenser being immersed in ice water and distilled until I had reached a temperature of something over 250 degrees Fahrenheit, I suppose I had distilled in the neighborhood of half hour, within five minutes of half hour; I didn't raise the temperature above this, possible 280 degrees, I have forgotten the exact figures, maybe from 250 to 280 degrees, and at the end of this time no perceptible distillate was coming over. I then stopped the distillation, and

110 measured the distillate and got 21 cubic centimeters, which was practically five per cent. of the original. I then examined the flash point of the distillate.

Q. What did you discover that to be?

A. That was 37 degrees; I then examined the flash point of the residue of the material from which the distillate had been taken, and that was 95 degrees in the closed cup tester, which would bring it about 120 degrees according to our Oklahoma method.

Q. That is allowing for the full 25 degrees difference?

A. Al-owing for the full 25 degrees difference; I would not be surprised the residue I have it here, would get the official safety test.

Q. What would you pronounce the distillate to be?

A. Well, it is what we generally term a naptha or a gasoline, I judge from general appearances, smell and flash point.

Q. I want to ask you, professor, if you should mix coal oil and gasoline in certain proportions, state whether or not the flash point of the mixture would be reduced from the flash point of the coal oil in direct proportion to the quantity of gasoline contained in the mixture?

A. No, there would be no direct ratio, for there are so many other things depend upon it.

Q. Explain to the court and jury why it would not be reduced in direct proportion?

A. I can take a gasoline of a very low flash point and mix it with kerosene, a given quantity of kerosene and gasoline at a very low flash point and mix it with kerosene, and that mixture would give me a lower flash point than if I took the same quantity of kerosene and gasoline, the gasoline having a higher flash point. So it all depends upon the flash point of the most volatile material.

111 Q. Is that in accordance with the test you made, as I understand it, you stated that you found five per cent. gasoline in the mixture?

A. Practically five per cent., yes sir.

Q. Without that the mixture itself flashed at 60, and you didn't continue to lower the temperature?

A. No sir.

Q. It flashed at 60?

A. No answer.

Q. Then would the flash point of the mixture be reduced to a greater extent than in direct proportion to the per cent of gasoline?

A. I can't say, that it would be reduced in a direct per cent.

Q. I didn't say direct, I say to a greater extent?

A. It would be reduced considerable because of the presence of the low flash point material that is present.

A. As I understand you the gasoline being present in the mixture, and the gasoline flashing at a low temperature, would be there to flash at any time?

A. Yes sir, that is correct.

Q. State professor from your knowledge of the properties of coal oil and gasoline, whether a mixture of coal oil and gasoline at the ratio of 95 and 5 per cent., would be a dangerous mixture or otherwise, to use as coal oil, ordinarily?

Objected to as incompetent, irrelevant and immaterial, the competency of the witness not being shown, which objection was by the Court overruled, to which the defendant excepted.

A. I believe it would.

112 Q. Professor, suppose you take a mixture of 95 per cent. coal oil and 5 per cent. gasoline, and pour a small quantity from a quarter to a third or half a pint, upon some wood and kindling that was in a stove, then without particular haste, take time to set down the oil can, procure a match and apply the lighted match to the kindling, state whether or not in your opinion under such circumstances, an explosion would occur?

Objected to as incompetent, irrelevant and immaterial, the com-

petency of the witness not being shown, and assuming a state of facts not proved.

By the COURT: Of course, there is no direct evidence, as to the applying of the match or pouring on the oil, that is inferential; I will permit him to answer the question, and when it comes to instructing the jury, I will try to control that by an instruction; if they find there is no sufficient evidence to warrant the basis for the question that they shall exclude the consideration of the results.

To which the defendant excepted.

Q. Question repeated.

A. It does not necessarily follow that an explosion will occur. The gasoline vapor is heavier than the air, and the gas would diffuse in the velocity which is inverse in proportion to the square roots of their densities. Now if I myself knew that there was gasoline in there, I wouldn't take the chance of lighting a match to that kerosene mixture for fear sufficient diffusion had taken place——

Objected to as not responsive to the question, which objection was by the court sustained, to which the plaintiff excepted.

113 Q. Well, now, just give your best opinion, you started to say what you would or wouldn't do, stop now and just give your opinion as to whether or not an explosion would likely occur, not necessarily, under those circumstances?

Objected to as incompetent, irrelevant and immaterial, assuming a state of facts not in proof or supported by any evidence, and calling for an improper conclusion, which objection was by the court overruled, to which the defendant excepted.

A. An explosion would likely occur, not necessarily, but would likely occur.

Q. Now state what would that depend upon, whether the length of time between the pouring of the oil or the surface over which the oil had gone?

Objected to as incompetent, irrelevant and immaterial——

Q. Explain to the jury what would make an explosion more likely or what would make it less likely?

Objected to as incompetent, irrelevant and immaterial, and assuming a state of facts not in proof, which objection was by the court overruled, to which the defendant excepted.

A. This mixture that you assume contains five per cent. of gasoline will volatilize or evaporate, as we ordinarily say, like all other evaporations take place, directly in proportion to the amount of surface in contact; the more surface a given amount of the mixture is spread over, the more rapidly will the oil mixture volatilize.

Q. Then as I understand you, it would depend upon the surface, that was covered by the mixture as to the extent of the evaporation, and the explosion would depend upon the extent of the evaporation?

A. It would depend upon the amount of surface, upon the tem-

perature of the surface upon which it falls, and upon the
114 length of time between pouring the kerosene on and lighting it.

Q. Under the circumstances which I have included in my hypothetical question, you said an explosion would likely occur in the stove?

A. It would likely occur.

Q. Now, professor, suppose that at that time, a two gallon oil can, containing something less than a gallon of this same mixture, 95 per cent. coal oil and 5 per cent. gasoline, were setting in the same room, within from three to five feet of the stove, with the spout open, and an explosion did occur within the stove, state whether or not in your judgment that explosion would cause an explosion of the oil can.

Objected to as incompetent, irrelevant and immaterial, assuming a state of facts not in proof, and calling for an improper conclusion, and to the competency of the witness, which objection was by the Court overruled, to which the defendant excepted.

A. Under the conditions stated it does not necessarily follow that it would, but it may, and I believe I can quote sufficient authorities on that subject and show similar things have occurred.

Defendant moves to strike out the last part of the answer as incompetent, irrelevant and immaterial, hearsay and not responsive to the question, which motion was by the Court sustained.

Q. As I understand you, it wouldn't necessarily, but would it likely occur under those conditions?

Objected to as leading, which objection was by the court overruled, to which the defendant excepted.

A. I will have to answer that question, in this way, Mr.
115 Huston, that it may occur, and it may not; the conditions are such that it may and may not occur, it is possible.

Q. State, professor, whether or not such explosion would be loud or not, in your opinion.

Objected to as incompetent, irrelevant and immaterial, and assuming a state of facts not in proof——

By the COURT: Which explosion do you refer to?

By Mr. HUSTON: Either one that he has referred to that might likely occur; suppose they should occur, would they make a loud report, necessarily or not.

By the COURT: He may answer, overruled.

To which the defendant excepted.

A. It all depends upon the conditions. When we speak of an explosion it is comparative; as a matter of fact the flash test is an explosion, the gases mix with the air and form all the way from burning mixtures up to explosions. If the conditions are such and the mixture is such that it would form an explosion, it would be probably a violent one, depending upon the amount of gases present or it may be a slow burning mixture.

By Mr. HUSTON: Well, as to the report whether it would make a loud report or otherwise, state whether or not that would depend upon how closely the explosive compound was confined or not?

A. Well, we can't distinguish there between the loud and sharp; I would have to answer this in this way, Mr. Huston, every year I made several demonstrations of explosive mixtures in my lecture room, with a practical working machine, testing explosive mixtures in mines, gases in mines; there I mix a given amount of air or certain percentage of air with a certain percentage of gasoline gas——

Objected to as not responsive to the question and immaterial.

116 By the COURT: That goes more to the competency of the witness, if you want to cross examine him on those matters, you may do so on cross-examination.

By Mr. HUSTON: Then go back, professor, to the original questions, supposing under those circumstances which I have stated, under which you said an explosion would likely occur, keeping in mind those circumstances and assuming that such an explosion had occurred, state whether or not under those circumstances the explosion would necessarily make a loud report or otherwise.

Objected to as incompetent, irrelevant and immaterial, and assuming a hypothesis not in proof, which objection was by the court overruled, to which the defendant excepted.

A. The explosion would not necessarily be loud.

Q. Wouldn't, you say?

A. Wouldn't necessarily be loud.

Q. What would be the difference, and explain the cause of such difference, if any, between an explosion of powder, for instance, that is as to the report, and the explosion of gas arising from a mixture of coal oil and gasoline?

A. I can't answer that, Mr. Huston, I can't say.

Q. Assume that such explosion as you have testified might likely occur, had occurred, state whether or not a person in close proximity to those explosions would likely be injured thereby in any way?

Objected to as incompetent, irrelevant and immaterial, and assuming a hypothesis not in proof, and calling for an improper conclusion, which objection was by the Court sustained, to which the plaintiff excepted.

117 Q. Assuming that such explosion or explosions had occurred, under those circumstances, what would be the effect of them first, as to any shock?

A. I don't quite understand your question.

Q. Well, assuming that such an explosion had occurred, state what if any gases would be formed or follow such an explosion?

Objected to as too indefinite, which objection was by the court overruled, to which the defendant excepted.

A. Well, I am not prepared to say what gases would be formed; of course in burning such material as this it is recognized that cer-

tain combinations take place, and there are certain products and by-products of the explosion, but I would have to know exactly what is present before I could state what gases are formed.

Q. Supposing that there was present the mixture which you have examined, coal oil and gasoline, and assume that to be a little less than a gallon had exploded, in two explosions, following the other, within a closed room, state whether or not any dangerous gases would follow practically immediately after such explosion?

Objected to as incompetent, irrelevant and immaterial and calling for a conclusion, being based upon a state of facts not in proof.

By the COURT: I think I will sustain the objection; the question is a little indefinite.

By Mr. HUSTON: Take a quantity of coal oil and gasoline, and cause the same to explode, would there not certain gases immediately be formed and generate thereabout?

Objected to as incompetent, irrelevant and immaterial, calling for a conclusion, and being based upon a state of facts not in proof, which objection was by the court overruled, to which the defendant excepted.

118 A. There would be gases formed.

Q. What would they be, carbon bi-oxide?

A. The specific material under consideration now is kerosene, and that is hydro-carbon. Hydro-carbons in burning, the rule is, all break down first into methane and carbon; the carbon will burn to carbon mon-oxide and carbon di-oxide. The methane will further break down, and the hydrogen in that will burn to water and the carbon there will burn to carbon mon-oxide or carbon di-oxide, depending on the supply of oxygen present.

Q. What is the character of these gases as to being poisonous or suffocating?

A. The carbon mon-oxide is poisonous and burns; the carbon di-oxide is a non-supporter of combustion and respiration, or suffocating.

Q. Now assuming an explosion of three fourths of a gallon of a mixture of coal oil and gasoline, such as you have examined, should occur, in a closed room 12 by 14, and a person or persons should be within the room, state whether or not those persons would be affected by those poisonous or suffocating gases?

A. That is from a gallon of gas in the can?

Q. Or three-fourths of a gallon.

A. No, they would not be injured by that amount in a room; there would not be carbon mon-oxide and carbon di-oxide enough to notice it.

Q. Well, what would be the effect upon the persons in the room of such an explosion?

A. If it stopped at that quantity of gas there would be no perceptible effect.

Q. I say three quarters of a gallon of the mixture, not of gas, of the whole mixture?

119 A. Oh, that is a different question. Immediately as soon as combustion takes place or immediately forming in there, a non-supporter of combustion, or respiration, and the effect would soon be that of asphixiation.

Q. Explain now the difference between that quantity of gas alone and the quantity of gas that would be generated from the explosion of three quarters of a gallon of such a mixture, coal oil and gasoline?

Objected to as incompetent, irrelevant and immaterial, assuming a hypothesis not in proof, and incompetent under the issues in this case, which objection was by the court sustained, to which the plaintiff excepted.

Q. What amount of such poisonous gases would arise from the explosion of three quarters of a gallon of such a mixture?

Objected to as incompetent, irrelevant and immaterial, assuming a hypothesis not in proof, and incompetent under the issues in this case, which objection was by the court overruled, to which the defendant excepted.

A. Well, there would be at least 1500 to 1800 times the volume of gas that we have of the liquid.

Q. Professor, have you had any experience in the use of coal oil in lighting fires?

A. Yes, sir.

Q. State whether or not from your knowledge of the properties of coal oil with a flash test of 120, state whether or not it would be dangerous to use coal oil to light a fire?

Objected to as incompetent, irrelevant and immaterial, and outside the issues in this case, which objection was by the Court overruled, to which the defendant excepted.

120 A. I make a fire with coal oil every morning.

Defendant moves to strike out as not responsive to the question, which motion was by the court sustained, to which the plaintiff excepted.

Q. Question repeated.

A. I thought I had answered that by saying what I did, for I don't use anything dangerous if I know it.

Objected to—sustained.

Q. Just leave out what you do and say whether it is dangerous, without stating what you did, state whether or not from your knowledge of the properties of coal oil whether it would be dangerous to use it?

A. No, it would not.

Q. State whether or not from your knowledge of the properties of this mixture which you examined whether it would be dangerous to use that to start a fire?

Objected to as incompetent, irrelevant and immaterial, and calling for a hypothesis not in proof, which objection was by the court overruled, to which the defendant excepted.

A. I believe it would.

Q. Suppose that a person should take a cold stove in which there was no fire or heat or had been none for eight or ten hours, and put therein a little paper and some kindling, and some wood, and pour a small quantity of coal oil, having a flash test of 120, then apply a match for the purpose of starting the fire, state whether or not in your opinion it would be dangerous to do so, or an explosion would likely occur, or could occur?

A. I wouldn't appoint it dangerous, coal oil, good coal oil.

Q. Would an explosion likely occur under such circumstances?

A. I don't think it would.

121 Q. State whether you know or not, whether coal oil is in general use in this country for the purpose of starting fires?

Objected to as incompetent, irrelevant and immaterial——

Q. State your general knowledge.

Objected to as incompetent, irrelevant and immaterial, not a proper subject for expert testimony. Objected to also for the further reason that the oil being sold under the law for illuminating purposes, it is immaterial in this action against a remote vendor because the remote vendor cannot be held for its use in kindling fires. Which objection was by the court sustained, to which the plaintiff excepted.

Q. Professor, do you know the usual and customary uses to which coal oil is put in this country?

Objected to as incompetent, irrelevant and immaterial and not supported by any issue in this case, which objection was by the court overruled, to which the defendant excepted.

A. The usual customary usages for coal oil I believe are——

Q. I just asked whether you know, do you know the usual and customary uses to which coal oil is put in this country?

A. Yes sir.

Q. State if you know what are the usual customary uses to which coal oil is put in this country?

Objected to as incompetent, irrelevant and immaterial, not supported by any pleading in this case, and to the competency of the witness.

By the COURT: I will sustain the objection. The court and jury should know the basis of the witness's knowledge when he says he knows the means of his knowledge, how he knows, and what

122 he knows about it are matters which should go to the court and jury first.

By Mr. HUSTON: Professor, how long have you lived in this country?

A. Thirteen years this coming April.

Q. Are you a married man and have you a family?

A. I have a wife and one child.
Q. Do you keep house?
A. I do.
Q. Are you pretty generally acquainted in the neighborhood of Stillwater where you live, first?
A. Yes sir, I believe so.
Q. Do you go out a good deal among people?
A. Yes sir.

Objected to as leading,—sustained.

Q. Well, state whether or not you have had opportunities to observe and to know the manner of life of people in general in this country?
A. Yes sir, I have observed somewhat.
Q. State whether or not you have had occasion to observe or learn the usual and customary uses to which the people in general put coal oil?

Objected to as incompetent, irrelevant and immaterial, leading and suggestive, which objection was by the Court sustained.
By Mr. HUSTON: On the ground it is leading?
By the COURT: Yes sir.
By Mr. HUSTON: Exception.

Q. State whether or not you have observed the manner of life of people in the community where you live and in Oklahoma in general as to their domestic arrangements?

Objected to as incompetent, irrelevant and immaterial,
123 which objection was by the Court overruled, to which the defendant excepted.

A. I suppose I have observed as much as the casual observer would know, from house to house. I haven't made it my particular business to pry into other people's affairs to see how they live.
Q. Without making it your business to pry into their affairs, during the 13 years that you have lived in the Territory and the ten years that you yourself have kept house, and your general observation, state whether or not you know to what uses the people in general put coal oil?

Objected to — incompetent, irrelevant and immaterial under any issue in this case.
By the COURT: I will sustain the objection at this time.
To which the plaintiff excepted.

By Mr. HUSTON: State whether or not you have had occasion to learn or observe frequently throughout the country or community the uses that people generally put coal oil to?

Objected to as incompetent, irrelevant and immaterial under the issues in this case.
By Mr. HUSTON: This is only a preliminary question as to his qualifications.
By the COURT: I know. Suppose he would say he had oppor-

tunities, how would the court know what opportunties he had; his judgment might differ entirely as to the Court's and the Court must determine his competency. If he has traveled around over the country and visited numerous households, and seen them build their fires, and seen what they kindle their fires with, and that has been general, he would be competent to testify to it. If he has lived in a community like I have, and don't go out and never saw
124 anybody else build a fire, he wouldn't be competent, so that it becomes a question of fact to be determined as to whether he has visited or been in or seen or known of other persons kindling fires, and what kind of kindling they use and what they used for it. Matters of common knowledge and experience it is not necessary to prove at all but matters of usage it is necessary to prove.

Cross-examination by Mr. SHARTEL:

Q. How long have you been connected with the Stillwater Agricultural and Mechanical College?

A. Thirteen years this coming April.

Q. Your business has chiefly consisted of instructing in chemistry?

A. Ye- sir.

Q. You haven't followed the profession of an analytical or commercial chemist?

A. I followed the profession of an analytical chemist for five years before I came to Oklahoma.

Q. During that time was your work in any way connected with oils as the principal feature of your business?

A. Not with oils, no sir, I was the experiment station chemist.

Q. Agricultural chemist?

A. Agricultural chemist.

Q. The actual training and contact which you have had with this oil subject is largely as you gathered it from books in the course of your training?

A. The question again please.

Q. The knowledge that you have in regard to the chemical composition of oil, their analysis and functions, is largely a matter or theoretical knowledge with you rather than of actual practice in handling the article itself?

A. I have had considerable practice along the line indi-
125 cated in my direct examination in reference to overseeing the students in their lab-ratory work.

Q. In the class room and lab-ratory work in dealing with these matters?

A. Yes sir.

Q. You didn't deal with the chemical analysis of the oils, but rather with their physical properties?

A. I have taken up on one or two occasion, under my direct supervision, a complete analysis.

Q. You never pushed that analysis to a final analysis I believe you said a while ago?

A. Only in one case where a student wrote a thesis from the

resinate working on down out of coal tar, and made a separation of the coal tar compounds.

Q. As far as the real chemical compounds of these various products of petroleum from the heavy residium on up to the very lightest naphtha, there isn't any variation in their chemistry, they are all composed of the same materials, are they not?

A. They are what we term hydro-carbons.

Q. And the attributes which distinguish them are physical rather than chemical?

A. Well, I can't say that, for some of them are more chemically active than others.

Q. Well, you take a very light and expensive gasoline, it is composed of the same chemical ingredients and the same chemical parts and united in the same proportions that ordinary kerosene, are they not?

A. In the same proportions, yes sir.

126 Q. And the same substances found, professor?

A. Same substances, carbon and hydrogen.

Q. Chemically united in the same proportions?

A. Same proportions.

Q. The distinguishing features between them is the weight of the liquid and their inflammability?

A. Yes sir.

Q. The gasolines and napthas and the kerosenes are all extracted from the same common substance, crude oil?

A. Crude oil, petroleum, and also we extract some of these things from the schales and the coal tar products, of course.

Q. The union or the mixing of coal oil and gasoline therefore is a mixture of materials containing the same chemical composition?

A. It is a mixture of compounds, yes sir.

Q. And what is the effect of a mixture of a small part of gasoline with a larger proportion of coal oil, in reference to whether it will separate like oil and water, or whether it becomes thoroughly incorporated together?

A. I believe they are mixable in all proportions.

Q. And they do make a complete mixture?

A. They make a complete mixture, I believe.

Q. Now, in dealing with these samples that were submitted to you, I believe you say you subjected the sample to a heat of 280 degrees?

A. Something like that.

Q. And you distilled that over into a reservoir that was imbedded in ice, conducted it in that way?

A. Yes sir.

Q. You subjected it to that heat for how long?

A. I would say a half hour, I think it was a half hour, between 25 and 35 minutes, until the distillate quit coming over.

127 Q. Well, if the oil itself which had received this mixture, possessed a specific gravity of 44, originally, and the residium which you tested had a specific gravity of 37——

A. I didn't say the residium had a specific gravity of 37, I said a flash point of 37.

Q. A flash point of 37?

A. A flash point of 37.

Q. That is with the mixture——?

A. No, the bi-product, the gasoline part had a flash point of 37 I didn't speak of any specific gravity.

Q. What is the specific gravity of the mixture that went over?

A. I didn't take the specific gravity of it; there was a very small quantity, and I didn't want to work with it.

Q. Did you take the specific gravity of what you had left?

A. I didn't take the specific gravity of what I had left.

Q. But by subjecting it to that heat of 280 degrees you did extract about five per cent. of lighter material from it?

A. About five per cent. a slight fraction over five per cent.

Q. And it would flash at 37 degrees?

A. 37 degrees.

Q. Isn't that exceptionally heavy gasoline that will flash at 37 degrees?

A. I don't know, I could not say it is.

Q. Do you know the flashing point of ordinary gasoline as sold in this country, say with a specific gravity of 67 or 68 degrees?

A. I have never tested it.

Q. As a matter of fact, ordinary gasoline will flash at any temperature above freezing, wont it?

128 A. I wouldn't be surprised to find it would flash very low.

Q. And this possessing a flashing point of 37 degrees was a much less inflammable gasoline that you got out of there than the ordinary commercial gasoline, isn't it?

A. Well, I haven't tested the ordinary commercial gasoline; if you will excuse me, I will say this, Mr. Shartel, that the gasoline that I use in my laboratory in the gas machine, is of 87 degrees, and I make the test with a hydrometer, and do not depend upon *upon* the flash test of course, so I have never made a test of the ordinary gasoline that is sold in this country as to the flash point.

Q. If the gasoline that went in there, into this mixture, would flash at any temperature above freezing or even above zero, Fahrenheit, then you got a good deal more gasoline out of there than went into the mixture, didn't you?

A. Ask that question again please?

Q. Suppose the gasoline that went in there had no flash test at all, suppose you couldn't apply it at any temperature?

A. Yes sir.

Q. And the gasoline you got out had a flash test, you got a whole lot more gasoline out than was put in the mixture, didn't you?

A. No, I didn't, not at all.

Q. Isn't it a fact that all kerosene has gasoline in it?

A. I suppose it is a fact that all kerosene has a little gasoline dissolved in it, yes sir.

Q. In greater or less proportions?

A. In greater or less proportions.

Q. Do you know how much gasoline you can get out of an ordinary 120 flash test by subjecting it to a heat of 280 degrees?

A. No, I do not.

129 Q. Isn't it a fact that you can get 3½ per cent.?

A. I don't know whether it is a fact or not, I say, I don't know.

Q. Do you know what temperature you have to heat ordinary kerosene to get all the gasoline out of it?

A. I do not, I would judge from the way the material is made originally you would have to heat it very hot, a very high temperature, and still some of the gasoline would remain unless you agitate it, shake it up or something of that kind; it is held there mechanically, probably.

Q. Professor, suppose that ordinary 120 degree flash test kerosene were poured into a stove in a considerable quantity, on wood and kindling and paper, so that it was diffused over a very wide surface and allowed to stand a few minutes, and you were to apply a match to it, what would be the result?

A. I wouldn't look for anything other than possibly a slight flash, very slight.

Q. You would get an explosion, wouldn't you?

A. Very slight indeed.

Q. Did you ever try it?

A. As I have testified before, I always make a fire with kerosene.

Q. But did you ever try doing that?

A. Spreading it over?

Q. And allowing it to stand a little while?

A. I don't make it a hobby to just run after matches after I pour kerosene on it.

Q. You light it pretty quick?

A. I light it pretty quick, yes sir.

Q. And the longer that mixture would stand there, diffused over that wood, with a great evaporating surface, the greater the flash you would get, wouldn't you?

130 A. It would all depend on the draft of the stove of course.

Q. The gas coming off of either kerosene or oil is heavier than the air, isn't it?

A. Yes sir.

Q. And if the flues were open in such a way, or drafts, so the air would go up, the gas produced by the oil would remain in the stove?

A. Not all of it, mechanically the air would carry away——

Q. If the draft was rapid enough it would carry it all?

A. Yes sir, practically.

Q. Or if the stove had no draft at all, so that the evaporation from that oil were imprisoned in the stove a few minutes, you could produce an explosion?

A. Yes sir.

Q. And you could produce a dangerous one too?

A. Yes sir, depending on the length of time, if there was no draft to the stove.

Q. Which really exercises the most explosive force, when they do go off, gasoline or kerosene?

A. I can't answer that from the fact that inasmuch as they are all hydro-carbons and will all form explosive mixtures with the air——

Q. Which will produce the greatest explosion, an ounce of oil or an ounce of gasoline, if ignited?

A. If ignited——

Q. Which would produce the most serious explosion?

A. Well, if you ignite an ounce of gasoline there will be no explosion at all; now an ounce of gasoline is different from an ounce of gasoline vapor, and if you ignite an ounce of kerosene there will be no explosion; possibly it won't burn when you apply the match to it.

131 Q. Which will produce the greatest volume of gas, oil or gasoline?

A. The oil being a higher molecular weight hydro-carbon in all probability will break down into lower compounds, and will produce a greater volume of gas, in all probability.

Q. Do you know the comparative difference between the amount of gas produced in vaporizing oils and gasolines?

A. No, I don't from the chemical composition in which they are broken down, or the cracking process, as that is called.

Q. In using kerosene as a kindling material for fires, what are the conditions likely to produce explosions?

A. The conditions that are likely to produce an explosion is to pour the kerosene there on hot wood or on hot coal or if any of the iron around the stove is hot you may volatilize that kerosene and that forms the same as gasoline, an explosive mixture with the air, so that if you pour your kerosene onto hot coals or a hot grate——

Q. Or even warm stove——

A. Well, the expression "warm" is a comparative one.

Q. Take a stove that may not have a bit of fire in it, but yet is away above the temperature of the atmosphere?

A. If it is away above the temperature of the atmosphere, then you are going to get a volatile material in there very rapidly.

Q. I want to ask you one question, professor, take a two gallon oil can with no opening into it except the small spout out of which oil is poured, let it set away from a stove four feet, suppose there is half a pint of oil in there, or oil and gasoline mixture, that does explode, is there any probability of that fire ever reaching into that oil can?

A. The fire from the stove?

Q. Yes sir.

A. No. It is possible but it is highly improbable.

132 Q. Very highly improbable that the oil in that can, under those conditions, could take fire from that explosion in the stove, isn't it?

A. You said the fire in the stove, and not the explosion in the stove; you said the fire, now the explosion in the stove produces a new element.

Q. What is that element?

A. The explosion in the stove may be rapid or may be slow, depending on the completeness of the mixture. In other words, as I

stated in my direct examination it may be what we term a flash or slow burning mixture; if it is a highly inflammable mixture, it might shoot out a long tongue of flame. Now it is possible to reach the can.

Q. Could that long tongue of flame, even though it came in contact with that can, set the contents of that can afire by connection with that spout?

A. Yes sir.

Q. Under what conditions?

A. Under the conditions that there is an explosive mixture in the can.

Q. Does that explosive mixture ever occur in a can which is giving off gas, like gasoline?

A. I can't say, if we can get——

Q. Can you get an explosion to go into the mouth of a gasoline can, or fire to go into it.

A. You can if you have the proper amount of gasoline in air.

Q. You have got to have air in there?

A. Yes sir.

Q. And isn't it a fact that that evaporation of that gasoline at all times excludes the air in that cavity above the oil?

133 A. Not necessarily, there might have been some air in there in the first place, and it diffuses with it and doesn't necessarily take it all out.

Q. Isn't it a fact that you can light at any time the spout of a gasoline can and it will burn the entire contents of the gasoline can without causing it to explode?

A. I wouldn't do it under any circumstances.

Q. Are you able to state whether that is a fact or not, have you ever tried it?

A. I have never tried it and wouldn't attempt it under any circumstances, the risk is too great.

Q. Professor, suppose a person were pouring this mixture from an oil can onto kindling wood, and there should be some coals or smouldering embers there in the wood or in the ashes, what would be the probable effect upon the oil in the can?

Objected to as incompetent, improper cross examination, and no foundation for the question, which objection was by the Court overruled, to which the plaintiff excepted.

A. The probable effect would be to ignite the oil at the mouth of the can, of there is a light or explosion inside the stove.

By Mr. HUSTON: What?

A. If the gas takes fire inside the stove, or the oil on its way down when it strikes the bottom of the stove takes fire, the chances are the fire would follow up the stream of oil.

By Mr. SHARTEL: Wouldn't the can be much more liable to get afire in that way than it would to flash across a barrier of atmosphere to reach the can?

Objected to as incompetent, irrelevant and immaterial, which

objection was by the court overruled, to which the plaintiff ex
cepted.

A. Yes sir, it would.

134 Q. No moderate quantity of this mixture of the characte
which you have experimented with, that was brought to yo
in these samples, deposited on that wood, would be very likely t
create a sheet of flame that would find that can, would it?

A. That would depend, Mr. Shartel, upon the length of time inte
vening between pouring the kerosene on the wood and striking th
match, provided there was no fire to begin with.

Q. Even if there was an explosive mixture in the entire atmo
phere of the room, the taking afire of the oil in the can could be a
improbability, wouldn't it?

A. Taking afire inside the can?

Q. Yes.

A. That would be highly improbable is the oil is not running ou
of the can.

Q. But suppose the can is simply setting there, let us assume i
this case that the oil had been poured in on this kindling wood
and that there was no fire in the stove, and that it was perfectl
cool, and the can set off to one side three or four or five feet awa
and a match is applied to the oil in the stove, isn't it very unlikel
and even a bare chance, that any flame resulting from that stov
would ever reach that can so as to set the can on fire?

A. It is very unlikely, but it is wholly possible.

Q. It is possible but unlikely?

A. Yes sir. It is possible for that flame to connect with the g
at the spout of the can, that is possible.

Q. The flame would have to be maintained, shooting out of th
stove for a considerable period, to ignite the contents of the can.

A. For a considerable distance?

Q. For a considerable distance and for a considerab
135 period, a mere flash wouldn't do it, would it?

A. Yes sir, I believe it would, a flash would do it.

Q. That is a flash insufficient to heat the contents of the can?

A. No, not set fire to the can, the flash would be sufficient to s
fire to the gas coming out of the can, provided that is an explosiv
mixture in the can.

Q. And that assumes that the can is warm enough to keep the g
pouring out of it?

A. Not necessarily keep it pouring out of it, no sir, there may
in that can an explosive mixture of air and gasoline——

Q. Isn't that very unlikely?

A. No- impossible.

Q. Doesn't the ordinary effect of a can of gasoline, with
vacuum above it, isn't that space full of gasoline, and the air ord
narily excluded?

A. The gasoline and air together.

Q. But doesn't the gasoline drive the air out of that space?

A. It does not drive all the air out, it diffuses with the air, th
is in there, and of course the longer it stands there the more high

it is saturated with gasoline vapor, and of course the further it gets away from the explosive mixture.

Q. Taking an explosion sufficient to break the door off of an ordinary round cylinder stove as they are ordinarily constructed, blow the top off the stove, and to blow the top off of a galvanized iron oil can, what would you say about the force of an explosion of that kind?

A. I would say it was a pretty vigorous explosion.

Q. An explosion sufficient to do that will make a pretty loud report won't it?

A. In all probability it will make a pretty good report, yes sir, I can't say to the contrary.

136 Q. Assuming that a person were standing in proximity to a stove when it was lighted, and found afterwards almost in the tracks where that person stood near the stove at the time the explosion took place, would you say that a person had been asphixiated in a position of that kind, from the effect of carbonic gases or other poisonous gases?

A. No, I would say that the person had been knocked down by the force of the explosion.

Q. And stunned so a person couldn't get away from it?

A. And stunned possibly by striking the floor.

Q. Or else enveloped in a sheet of flame that produced almost instant death?

A. That is not improbable, that the flame that came out, if that explosion was so vigorous, to immediately envelope the person in flame and overcome them.

Q. The natural instinct of persons in positions of that kind, even though they may have been stunned or shocked, would be to get as far away from it as they could wouldn't it?

A. If they had time.

Q. And the position would indicate that volition had entirely departed, or else the person was stunned, that they had lost the power of movement, right on the spot?

A. It might mean, it looks as if the person had been overcome immediately from the force of the explosion.

Q. If this mixture had not been made, and the material used there was ordinary kerosene poured into a hot stove or onto coals or embers, and it should take fire in the act of pouring, what would the result be?

137 Objected to for the reason there is no foundation for the hypothetical question, which objection was by the court overruled, to which the plaintiff excepted.

A. If the coal oil is poured onto the hot coals, temperature high enough to ignite the gas, there would be an explosion in the stove.

Q. What would be the effect on the can?

A. I can't say in that case, the can might take fire, but if it is knocked out of the hands of the individual holding it, possibly the fire would get it, it would depend upon the condition of the spout,

whether it is a large spout or a small one; it would be very hard to say directly in that case.

Q. Wouldn't the can under those circumstances be just as likely to explode as though it has gasoline mixed in it?

A. No, when the can is tilted up in the position of pouring, the explosive gas from the inside of the can is not in contact with the flame, it is cut off with a trap, so to speak, by the kerosene, and the coal oil itself will not explode, it is the gas that forms the explosive mixture with the air.

Q. Now coming back to the properties of this coal oil, kerosene in all of its grades, is harmless except when brought in contact with fire?

Objected to as to the form of the question. Question withdrawn.

Q. Neither kerosene or gasoline spontaneously generate combustion, do they?

A. They do not.

Q. The only way that a combustion or explosion can be produced is by bringing either the liquid itself or the gases produced by the liquid in contact with fire?

A. With fire, and that must be warm enough to ignite them, a certain temperature to ignite, that is correct.

138 Q. What is the igniting temperature?

A. I don't know, I don't have any authority, Mr. Shartel, on the point of ignition; I can't tell you, I looked up the matter, but none of the lectures I have gave it, so I can't tell you the temperature of the combustion.

Q. But in neither event could the explosion or ignitions be produced with either liquid without the use of fire, is that correct?

A. There must be fire or what is practically equivalent to it, electricity, by a spark of some kind; there must be heat.

Q. An ordinary degree of heat, boiling water or heat of that kind would not ignite either one of them?

A. No sir.

Q. It is far above boiling point?

A. Yes sir, several hundred degrees I judge, I wouldn't like to state the exact temperature.

Q. Somewhere from 500 to 1500 degrees?

A. It is very hot, at least.

Q. It takes a hot fire to set them off?

A. Yes sir.

Q. I will now ask you if all illuminating oils as they are sold commercially and within the limits of inspections, 120 degree flash test, don't carry a considerable percentage of gasoline?

A. I can't answer that by saying all illuminating oils do.

Q. I am saying all illuminating oils of 120 degree flash test?

A. I think illuminating oil of 120 — flash test, unless it had been especially prepared, and I don't know the exact up-to-date method of refining the kerosene to get rid of the light gasoline, but unless it had been especially prepared or especially redistilled, would contain

a slight amount of gasoline, although illuminating oil at a flash test of 120 degrees may not necessarily contain some gasoline if
139 it has been vaporized, sprayed, and the air driven through it, the chances are that the light material has been driven away.

Q. I will ask you if it is possible to produce a kerosene oil having 120 degree flash test, and a specific gravity of 46 on the Baume scale, without a considerable percentage of gasoline in its composition?

A. It is possible, but I would say that it would be a chemical curiosity rather than——

Q. It would be impossible as a commercial proposition?

A. As a commercial proposition.

Q. Would not be within the reach of people to buy for coal oil?

A. No sir, I don't think it would. Now in answer to that you say a little bit of gasoline, I say a small percentage, a small amount, possibly a fraction of — per cent., it will contain some of it.

Q. What percentage of gasoline, pouring in on wood, without any artificial heat in it, or the heat of the atmosphere, say a normal temperature, would generate into gas from a mixture of this kind, say in the course of three or four minutes?

A. It depends all upon the gasoline.

Q. I am talking of a mixture of four and one half per cent. gasoline, with 122 or 124 flash test oil?

A. Well, I never performed the experiment to see what percentage although if it is spread over considerable surface of wood, the volatile point of gasoline being much below that of the normal temperature, would evaporate very rapidly, I couldn't express it in percentage.

Q. Would one-tenth of it evaporate in five minutes?

A. Yes sir, more than one tenth of it would evaporate in five minutes, it is simply an approximation, I don't like to state
140 questions, Mr. Shartel, that I haven't really specific data in reference to.

Q. Now, take the illustration of a third of a pint of this mixture put in a stove, poured on the wood, how much gasoline would there be in that mixture?

A. Well, this mixture we speak of would be five per cent. of a third of a pint.

Q. Five per cent. of a third of a pint?

A. If that is what was put in.

Q. That would be 1/60 part of a pint.

A. Whatever you figured it out to be.

Q. Wouldn't it?

A. Five per cent. is 1/20 of 100 per cent. I believe.

Q. Is it 1/60 of one pint?

Objected to as being a mathematical proposition——

Q. Am I correct in that?

A. If your figures are correct, I am not a lightning calculator, I suppose you are correct.

By Mr. HUSTON: In reply to one of the hypothetical questions of

Mr. Shartel, you said that if coal oil were poured into a stove where there was a light, there would be an explosion?

A. There would be an explosion.

Q. If there were no light, no exceedingly hot coals, would there be an explosion?

A. If there was nothing there to ignite the gas or the oil there would be no explosion.

141 E. C. RINGER, a witness for the plaintiff, being called and sworn, testified as follows:

Direct examination by Mr. HUSTON:

Q. State your name to the jury.

A. E. C. Ringer.

Q. Where do you reside?

A. Making my home in Guthrie, at present.

Q. What is your profession or occupation?

A. Teaching in the Logan County High School.

Q. Do you have a specialty?

A. I have.

Q. State what it is.

A. Chemistry and physics.

Q. How long have you made a study of chemistry?

Q. Well, in years, I have studied it for about seven years, past, off and on.

Q. State what experience you have had.

A. I have a full college course, and have taught it the past two years here.

Q. What experience have you had in making experiments, chemical experiments, either——

A. In class work I have made chemical experiments for three years right along with the class work, and the past two years in teaching here.

Q. State whether or not you have made experiments and observed experiments made with petroleum, the products of petroleum?

A. Not to a great extent, except in class work and laboratory work in organic chemistry.

Q. What are some of the products of petroleum, the most used ones?

142 A. The most used ones are gasoline, benzine, naptha, kerosene, and the lighter lubricating oils, and the heavier oils, parafine, vaseline, and asphalt, besides some that are not commercially well known.

Q. Have you stated them in the order of their lightness down to the solids.

A. Well, let me see now, I don't remember now just how I gave them, but gasoline would be the lighest, that is well known commercially, and then would come benzine, naptha and kerosene, and then on down to the lubricating oils.

Q. Coming below the lubricating oils, going to the solids, what do you get?

A. Vaseline and parafine. These are about all that are well known commercially; there are a few I am not familiar with between parafine and asphalt.

Q. State, professor, what is the difference between gasoline and kerosene, the ordinary coal oil?

A. Well, speaking of it from a chemical standpoint, we will say it depends entirely on the numbers of atoms in a molecule, or the heaviness of the molecule of the different compounds; the kerosene has a heavier molecule than the gasoline, and more atoms in a molecule; the substances are the same and in the same proportions.

Q. Have you had any experience in testing these fluids or testing coal oil, can you make a test of coal oil?

A. Yes, sir.

Q. Now, speaking of coal oil, with a flash test of 120 degrees Fahrenheit, explain how that test is made, and what do you mean by that test.

A. We simply mean that when we raise it to that temperature it gives off a vapor that will ignite if a flame is brought in contact with it; below that temperature you can't ignite the oil
143 without bringing the flame in contact with the oil or very nearly so, but at that temperature and above it, a vapor will be given off which will ignite.

Q. Now, suppose you should mix coal oil or kerosene and gasoline together, state whether or not the mixing of the two fluids would reduce the point where the mixture would flash?

A. It would reduce it.

Q. Now suppose that you should mix coal oil and gasoline in certain proportions together, would the degree at which the mixture would flash be merely reduced in direct proportion to the amount of gasoline contained in the mixture or otherwise?

A. It would be otherwise.

Q. Explain why?

A. Because when you mix kerosene and gasoline, the two liquids retain their identity, your gasoline is there and your kerosene is there, and we know that every liquid has its own vapor pressure at a certain temperature, and that gasolin, although it is mixed with the kerosene, will have its vapor pressure, this tendency for it to evaporate will be there, it will not evaporate so readily but it will evaporate as certainly as though it were entirely distinct.

Q. Then suppose that a mixture of 95 per cent. coal oil and five per cent. gasoline, or take such a mixture, and assume that the flash point of the coal oil was 120 degrees Fahrenheit, state whether or not that mixture would be reduced more than five per cent.?

Objected to as incompetent, irrelevant and immaterial and to the competency of the witness, which objection was by the Court overruled, to which the defendant excepted.

A. It would be reduced more than five per cent.

144 Q. Take a mixture containing 95 per cent. coal oil and 5 per cent. gasoline, and pour a small quantity of the same, from a quarter to a half a pint, upon a quantity of wood and kind-

ling within a stove, and without particular haste, put down the can, procure a match and light it, apply the lighted match to the stove or to the kindling where this mixture had been poured, state whether or not in your opinion an explosion would occur?

Objected to as incompetent, irrelevant and immaterial, the competency of the witness not being shown, and not based on the evidence in regard to the proportion of the mixture, which objection was by the Court overruled, to which the defendant excepted.

A. In my opinion there would be danger of an explosion; I don't say it would occur, but there would be danger of it.

Q. State whether or not in your opinion an explosion would be likely or probable?

Objected to as incompetent, irrelevant and immaterial and leading, which objection was by the Court sustained.

Q. Well, state what would be the likely or probable result.

Objected to as incompetent, irrelevant and immaterial and leading, which objection was by the Court overruled, to which the defendant excepted.

A. The probable result of that, it would depend of course on the temperature of the room, because we know the gasoline will evaporate more rapidly at a high temperature than at a low temperature.

Q. Proceed.

A. It would depend on the temperature, and I would say it also depends on the length of time, of course some people would be able to get a match and light it quicker than others would, but taking the average, my opinion would be that there would not be more than an equal chance or perhaps that the chances would be
145 rather against an explosion.

Q. You say that would depend however, on the circumstances?

A. Yes sir.

Q. The surface over which the oil had been diffused?

A. Yes sir.

Q. And the length of time in procuring the match and the temperature of the room?

A. Yes sir.

Q. If the temperature was higher or the time extended slightly or the oil diffused over a broader surface then what do you say would be the probable result?

A. If all those things were taken together, there would be in my opinion a great deal of danger of an explosion. Any one of these things you mention would increase the danger of an explosion.

Q. Assume that such an explosion would occur, and assume that a two gallon oil can with something less than a gallon of oil therein, were sitting in the room where the stove was, with the spout open, state whether or not in your opinion the first explosion would cause an explosion of the oil can containing the same mixture?

A. It would be hard to count upon as to whether it would or not, but it is easily possible that it could.

Defendant moves to strike out the answer of the witness as incompetent, irrelevant and immaterial, which motion was by the Court overruled, to which the defendant excepted.

Q. State what in your opinion would be the likely or probable result of the first explosion upon the oil can and its contents.

A. You mean the first explosion?

Q. The explosion in the stove, yes sir, what would be the probable result of that first explosion in the stove, assuming that it had occurred, upon the oil can and its contents?

146 A. Well, the contents of the oil can would have to include not only the oil but a vapor above the oil, and if that vapor were somewhere near an explosive mixture or perhaps the percentage of oil a little larger than that of the air, then some of that vapor would have escaped into the room and possible may have united with some of the vapor from the oil that was poured into the stove. If that were to take place, the explosion would probably be transferred to the interior of the can.

Q. Professor, take an ordinary heating stove, find therein wood, and kindling and paper, and find that stove partially broken, one hinge knocked off, the top off, no fire in the stove, but slightly scorched appearance of the wood and kindling therein, take an oil can near the stove, the body of the can laying in one place, the top of the can in another, and say it was known that the can had contained nearly a gallon of a mixture of 95 per cent. coal oil and 5 per cent. gasoline, and assume that the stove a couple of hours before these conditions are discovered, was in good condition, intact, and that these conditions were discovered immediately upon finding the house where the stove was full of smoke and gas, state whether or not in your opinion an explosion of this mixture had occurred there?

Objected to as incompetent, irrelevant and immaterial, being a hypothesis not based on the proof and calling for an incompetent conclusion, and invading the province of the jury, which objection was by the Court sustained, to which the plaintiff excepted.

Q. Professor, state whether or not you have had any experience in using ordinary coal oil in kindling fires?

Objected to as incompetent, irrelevant and immaterial under the issues in this case, which objection was by the court overruled, to which the defendant excepted.

147 A. I have.

Q. To what extent?

Objected to as incompetent, irrelevant and immaterial under the issues in this case, which objection was by the court overruled, to which the defendant excepted.

A. From the fact that while I was away from home, at school,

and also down here, I found that that was the most convenient kind of kindling to use, so that that would include a period of about between five and six years, that I have used it personally.

Defendant moves to strike out the answer of the witness as incompetent, irrelevant and immaterial to any issue in this case, which motion was by the Court overruled, to which the defendant excepted.

Q. From your knowledge of the properties of ordinary coal oil, state whether or not in your opinion it is dangerous to use ordinary coal oil to kindle a fire in a cold stove, where there is no fire?

Objected to as incompetent, irrelevant and immaterial, and calling for an improper conclusion and invading the province of the jury, which objection was by the Court overruled, to which the defendant excepted.

A. There is no doubt but what it is perfectly safe if proper care is used in not putting it in a stove that is too hot to begin with and leaving it too long before applying a match.

Q. If it be ordinary coal oil, state whether or not there would be any danger from an accumulation of gas therefrom in the stove?

A. For how long a time?

Q. Well, take any length of time, and state whether or not more gas would ordinarily accumulate than would be carried off in the draft of ordinary coal oil?

148 A. The only way to answer that would be to know something about the draft.

Q. Well, take about the ordinary conditions?

A. If the draft is open, it will carry the gas off fast enough so that it will not be dangerous.

Q. In the case of ordinary coal oil?

A. Yes, sir.

Q. Take a mixture such as has been described, would that be dangerous?

A. From my knowledge of the vaporizing temperature of most all gasoline, I would be afraid to try it.

Defendant moves to strike out the answer as not responsive to the question, which motion was by the court sustained, to which the plaintiff excepted.

Cross-examination by Mr. SHARTEL:

Q. Professor, suppose that a mixture of 67 degree gasoline of 4½ per cent. or 4.4 per cent. to be exact about it, in an illuminating oil with a flashing point of 124, should be applied at the bottom of a large tank, would that mixture go off to itself, the gasoline go off to itself or would it become thoroughfly incorporated with the body of the oil itself?

A. It would depend on the length of time, if you give it time enough it will become practically incorporated with the kerosene.

Q. Suppose that mixture should be made on the 19th day of

January in a stationary tank, applied at the bottom, on the 28th day of January it should be drawn off from the bottom into barrels and hauled by dray to a railroad station, loaded on the cars and shipped twenty miles, and then hauled in a wagon half or a quarter of a mile to a store, and then poured into a new receptacle
149 at that point *at that point,* what would be the effect of that mixture as to becoming thoroughly and completely incorporated in the body of that oil.

A. You say it is introduced on the 19th at the bottom?

Q. Yes sir.

A. And drawn off on the 28th from the bottom?

Q. Yes sir.

A. Stationary tank?

Q. Yes sir.

A. I should say it would be very thoroughly mixed in that number of days; it would mix pretty thoroughly in the tank.

Q. What percentage of gas would that mixture give off at 120 degrees temperature?

A. What do you mean by what percentage of gas, do you mean what per cent. of the gas would be kerosene——

Q. What percentage of the gas would that liquid yield up in any reasonable time, say 15 or 20 minutes under 120 degrees temperature?

A. It would depend on what kind of vessel it was in; if it was spread out over all the surface, if it were spread out very largely it would yield up well, quite a large per cent. of the gasoline would evaporate in that time; if it were in a shallow narrow vessel it would only be a small per cent.

Q. You can't give the figures on what yield of gas would be on a mixture of that kind, incorporated in that way?

A. Not exactly I can't.

Q. As a matter of fact it takes from 250 to 280 degrees of heat to drive that gasoline out of there, don't it?

A. Gasoline boils at about 225 or 250, somewhere along there, about the same as water or a little above.

150 Q. And it would take that heat to separate that gasoline in any considerable quantity from that oil, that is what it takes to distill it out of that oil again?

A. Yes sir.

Q. There is a molecular adhesion that holds that gasoline in there against temperature that would ordinarily vaporize the gasoline if standing alone, isn't there?

A. It will hold it so it won't evaporate as readily, but it will evaporate at practically the same temperature or nearly so.

Q. Now, what is the ordinary normal temperature where people feel comfortable in a room?

A. All the way from 70 to 90, most people about 75 or 80.

Q. Suppose that the condition of the room where this stove was located, no fire in it, was such that on the evening previous the room got so cold they went to bed to avoid making a fire in this stove; that the temperature remained in that condition until the

following morning, no fire in the stove, at which time it blew up cold, the weather turned cold, and it was found necessary to build a fire in that stove, having had no fire in it for ten or twelve hours, perfectly cool, kindling applied, wood placed in the stove, and any quantity of this oil ordinarily used for this purpose, containing this mixture, 4.4, should be poured in there and should be lighted within any reasonable time would — be likely to produce an explosion.

A. I answered practically the same question for Mr. Huston, in saying there was a probability of an explosion, the chances, if the room was very cold, would be rather against an explosion; if the room were not too cold it would be perhaps an equal chance for an explosion.

Q. Depending on the condition of the draft in the stove?

A. Yes, sir.

151 Q. As to whether the dampers were all closed?

A. Yes sir.

Q. And whether the gas could escape up the flue?

A. In the length of time that elapses, and from the surface diffusion in the stove.

Q. It depends on a great many things as to whether it would be likely to produce an explosion or not?

A. Yes sir.

Q. Under the same conditions, if you poured the oil in there without this gasoline mixture, poured it over this wood, gave it a wide evaporating surface, with the damper in the stove closed and the draft shut off, and waited a short time before lighting it, wouldn't that also be likely to produce an explosion?

A. From my knowledge of kerosene I would consider that perfectly safe to do that.

Defendant moves to strike out the answer of the witness——

A. —because I have done it so many times myself.

Which motion was by the Court overruled, to which the defendant excepted.

Q. The question is, professor, if you put that oil in there on that wood, and leave your draft closed, and let it remain a considerable length of time before lighting it, wouldn't it be likely to produce an explosion?

A. It would depend on the temperature of the room. Now from what you said a few moments ago, I would draw the conclusion that you assume the temperature of that room to be about 32 degrees——

Q. I am not asking anything about the temperature at this time?

A. It is rather cold in the room, and if the room is pretty cold, I would consider that safe; if the room was warm it would be dangerous with kerosene.

152 Q. If the room is pretty cold how would it be with this 4 per cent. mixture?

A. It would increase the danger.

Q. And in order to produce the likelihood of explosion, there would have to be some little time intervene between applying the mixture and lighting it, and the draft would have to be in such condition that the gases would not be carried away?

A. Those would favor the danger very much.

Q. If the draft was left open so that what little gas came off of it, would go up the chimney, probably wouldn't be any explosion?

A. There might not, it could be possible, but not necessarily at all.

Q. The suggestion of communicating this fire to an oil can standing five or six feet away from the stove, by what means could that be communicated, through the air.

A. It would have to be done from the fact that there would be an explosive mixture in the can that would be escaping through the spout and that gas communicate with the vapor that was escaping from the stove.

Q. There would have to be an explosive mixture of oil and air coming out of that stove, and would have to be an explosive mixture of oil and air or gas and air rather, from the oil coming from the can too?

A. Yes sir.

Q. All at the same time?

A. Yes sir.

Q. And you would have to form a connecting sheet of flame between the stove and the can?

A. Yes sir, certainly.

Q. Isn't that a very unlikely proposition under the facts I narrated to you a moment ago, considering the temperature of
153 the room?

A. As I said a while ago, it would depend on all these conditions we named.

Q. Just answer my question, in view of the temperature of the room?

A. I can't say that it would be, you say be very unlikely?

Q. Yes sir, I said very unlikely.

A. Under certain conditions it would not be very unlikely, and under other conditions it would be unlikely.

Q. Well, I am talking now about the temperature below the normal, where people would feel uncomfortable in a room without a fire?

A. Yes sir, and the conditions of the drafts in the stove?

Q. Yes sir.

A. And the amount of surface that oil was spread over?

Q. Yes sir.

A. And the time that elapsed?

Q. And the time that elapsed; cold stove, cold can, cold air?

A. Well, I would say the chances would be against an explosion in that case being communicated to the can; I wouldn't say——

Q. You wouldn't want to say there is a certain percentage of chances or anything of that kind?

A. I couldn't say, it would be impossible, but the chances would be against——

Q. That kind of a proposition?

A. Yes sir.

Q. Suppose that stove had fire in it there, in the shape of blaze or smouldering embers, and you attempted to pour that mixture onto the fire directly from the can, then what would happen?

A. There would be an explosion then very likely.

154 Q. And that explosion would be sure to involve both the can and the stove, wouldn't it?

A. Almost certainly.

Q. Almost certainly, the fire would run right up that stream of oil into the can?

A. Yes sir, if that stream of oil filled the spout entirely it would shut it off, but she would probably tip the can back.

Q. Necessarily tip it back when she say there was a fire, and then the fire would be sure to go into the can?

A. Communicate with the vapor in the can in that case.

Q. And that is about the way these things generally happen too, ain't it?

Objected to—sustained.

By Mr. HUSTON: I want to ask you, professor, suppose that that can containing this dangerous mixture had been setting in another room where it was much warmer, and brought into the room where there was no fire, then would the explosion be more likely to occur?

A. Well, I wouldn't say that it would, Mr. Huston, because in that case the vapor in the can might be above the degrees of mixing, that is, there might be too much of the gasoline vapor for an explosive mixture, you can get too much gas for an explosive mixture.

Q. That would depend on the temperature?

A. Yes sir.

Q. And that would depend on how warm the room was where it had been setting?

A. Yes sir, and the length of time that oil had been purchased and kept closed.

By the COURT: Doctor, if a two gallon galvanized iron oil

155 can, with a cone top and spout for pouring the oil out, containing about three-quarters of a gallon of the mixture that has been testified about, composed of kerosene and gasoline, was left setting in a room 12 by 14 or 15 feet square, and the house should get afire and burn, with that can setting there, what would you say would be the first effects on the can and the results?

A. If the spout were open the vapor would escape from the can and would catch fire, and then the vapor inside the can would explode, but if the spout were closed, the oil in the can would become heated and would vaporize and form such a pressure in there that it would burst the can without taking fire, and then as soon as it did that it would explode from the heat outside.

Q. In either event there would be an explosion in your judgment from the heat of the burning building?

A. No doubt about it.

Q. Before the oil would be consumed?

A. Yes sir.

Q. What do you say as to the possibility of setting fire to the fluid in a can of that kind?

A. By fire in the house?

Q. In any manner, flames on the outside, match or otherwise?

A. Well, if the spout were open, and there was an explosive mixture in the can, and a match were applied to the spout; it would explode and might take fire or might not; there might be an explosion there and yet the oil not ignite, but it would be likely to ignite and burn it also after the explosion had taken place.

By Mr. SHARTEL: By explosive mixture you mean a mixture of air and gasoline?

A. In the right per cent.

156 Q. In the upper part of the can?

A. Yes sir.

Q. If the mixture was all gasoline, it wouldn't enter into the can?

A. No sir.

Q. As long as that didn't heat in there faster than that gas could come out of there, it would burn like a lamp on the spout of the oil can?

A. Yes sir.

By Mr. HUSTON: It all depends on the proportion of the gas and air to make an explosive mixture?

A. Yes sir, or combustible mixture either, for that matter.

Q. That depends on temperature?

A. Yes sir.

Dr. E. G. SHARP, a witness for the Plaintiff being called and sworn, testified as follows:

Direct examination by Mr. HUSTON:

Q. State your name to the jury.

A. E. G. Sharp.

Q. Where do you reside?

A. Guthrie.

Q. What is your profession?

A. Physician and surgeon.

Q. Are you acquainted with the plaintiff in this case, Mr. A. B. Deselms?

A. I am.

Q. And were you acquainted with his family?

A. I was.

Q. Did you know his two children?

A. I did.

157 Q. I will ask you, doctor, to describe to the jury the little boy Fred, as you knew him, his general appearance, health and general mentality.

A. Well,—do you want just a general description?

Q. A general description of him physically and mentally?

A. Well, he wasn't a strong child, rather shrinking or timid disposition, otherwise than *than* that about the average of a child of his age.

Q. How as to health?
A. I said he wasn't strong.
Q. Take a house which about 8 o'clock in the morning was inhabited by a woman with two children, one four and the other two, and also find in the house a two gallon oil can containing about three-fourths of a gallon of a mixture of coal oil and gasoline, and say that about eight o'clock in the morning a fire was burning in the kitchen stove, no fire in the stove in the only other room; say a lady about that time made a suggestion about making a fire there, and an hour and a half afterward found smoke issuing from the house; the first person going therein finds the house full of smoke and gas, found the stove door, one hinge knocked off, the top of the stove off, this oil can which had contained that mixture lying on the floor, the body of it, with the top of it several feet distant from the body of the can; find the woman lying on the floor dead, the children, one lying on one bed, and the other on the other bed in that room dead, what in your opinion would you say was the cause of the death of those children?

By Mr. SHARTEL: I want to ask the doctor a preliminary question. Do you make a business of prescribing kerosene for your patients?

158 By Mr. HUSTON: That is not a very cute question, I object to it.

By Mr. SHARTEL: I object to the competency of the witness and for the further reason it invades the province of the jury; which objection was by the Court sustained, to which the plaintiff excepted.

By Mr. HUSTON: Did you see the bottles on the day that the fire occurred?
A. On the evening of that day, yes sir?
Q. Did you observe the premises?
A. I did to some extent.
Q. Did you learn of this mixture of coal oil and gasoline?
A. I was told of it.
Q. Now from what you had learned of that, and from what you observed of the conditions there, seeing the dead bodies, state in your opinion what was the cause of the death of the children?

Objected to as incompetent, irrelevant and immaterial, and calling for an improper conclusion, which objection was by the Court sustained, to which the plaintiff excepted.

J. W. POWERS, being recalled by the plaintiff, testified as follows:

By Mr. HUSTON: Examine those slips of paper and state whether or not your own initials are thereon?
A. Yes sir, they are.
Q. Who placed them there?
A. I did.
Q. In your own handwriting?
A. Yes sir.

Q. State what that slip is with your initials on?
A. That is a slip that was placed over the mouth of a bottle that contained oil drawn from our retail storage tank at Orlando.
159 Q. Was that oil a sample of this mixture that has been testified to?
A. Yes sir.
Q. Was that placed over one of the bottles that was placed in the custody of Mr. Cowman, the druggist?
A. Yes sir, it was.
By Mr. SHARTEL: I don't know that I recollect that you stated just when that sample was taken out of that can or not.
A. I didn't state.
Q. When was it done in reference to the fire?
A. It was done the morning following the fire.
Q. On the fifth of February?
A. The fifth of February.

A. B. DESELMS, the plaintiff, being recalled in his own behalf, testified as follows:

By Mr. HUSTON: I want to ask you first, Mr. Deselms, to describe your heating stove, what was its condition, state whether it was a new or old stove.
A. The heating stove was a new White stove, what is called the White stove.
Q. What was its condition?
A. It was new.
Q. As to being in good repair?
A. By being new it was in good repair.
Q. How about the door and hinges?
A. They were all new, nothing broke about it.
Q. I want to ask you about the cap to the spout of your coal oil can, did you have a cap to that spout?
A. No sir, not at the time of the fire.
Q. What had become of it?
160 A. We had lost it some—oh, quite a while back, and I had been using a potato on it.
Q. Examine these slips of paper, state whether or not you can identify them?
A. Yes sir.
Q. What are they?
A. They are strips of paper that was placed over the bottles of oil that were drawn from this same mixture of coal oil from our storage tank the morning following the fire; I saw those placed over those bottles and sealed.
Q. Are your own initials there?
A. Yes sir.
Q. Did you place them there?
A. Yes sir.
Q. Were the bottles over which those slips were pasted, among those bottles delivered into the custody of Mr. Cowman, the druggist?

A. Yes sir.

Q. State whether or not the bottles over which those slips were fastened, were the bottles which you delivered to Professor Holter?

A. These are the same that I received from Cowman, that I took to Holter, yes sir.

Q. Are these slips the same that were placed over the tops of the bottles that you delivered to Professor Holter?

A. Yes sir.

N. M. CARTER, being recalled for further cross examination by the defendant, testified as follows:

By Mr. SHARTEL: Mr. Carter, I want to ask you about the flash point of the contents of that tank before this mixture, do you know what it was or have you any memoranda which shows it?

161 Objected to as improper cross examination, and part of their defense.

By the COURT: I don't think they interrogated him anything about the test of it.

To which ruling the defendant excepted.

By Mr. SHARTEL: What was the specific gravity of this gasoline?

Objected to as incompetent, improper cross examination, which objection was by the Court sustained, to which the defendant excepted.

The plaintiff here rests.

Thereupon the defendant filed the following demurrer to the evidence of the plaintiff, to wit:

In the District Court of Logan Co., Okla.

A. B. DESELMS, Plaintiff,
v.
WATERS-PIERCE OIL Co., Defendant.

Demurrer to Plaintiff's Evidence.

Comes now the plaintiff and demurs to the evidence on behalf of the plaintiff herein on the ground that such evidence does not show facts sufficient to show a cause of action in favor of plaintiff and against this defendant.

SHARTEL, KEATON & WELLS,
Att'ys for Defendant.

Endorsed: No. 4068. A. B. Deselms *vs.* Waters-Pierce Oil Co. Demurrer to Evidence. Filed March 4, 1905, T. A. Neal, Clerk by Wm. R. Benham, Deputy.

162 By the COURT: Demurrer overruled, proceed with your evidence.

To which ruling the defendant excepted.

WILLIAM M. CHAUVENET, a witness for the defendant being called and sworn, testified as follows:

Direct examination by Mr. SHARTEL:

Q. You may state your name.
A. William M. Chauvenet.
Q. Where do you reside?
A. In St. Louis, Missouri.
Q. What business are you engaged in?
A. I am a mining engineer and analytical chemist.
Q. How long have you been engaged in that business?
A. Twenty five years.
Q. You may state whether or not you have had any experience in illuminating oils and products of petroleum?
A. As part of my work as an analytical chemist I have had much to do with the analysis of petroleum and its products, both commercially and scientifically.
Q. You may state whether you know how the admixture of 4.4 per cent. of 7 degree gasoline with a body of prime white oil, would affect it as a burning mixture.

Objected to for the reason there is no foundation for the hypothetical question, which objection was by the Court sustained, to which the defendant excepted.

By Mr. SHARTEL: I will say we will show by another witness that the gasoline was 7 degree gasoline.
By the COURT: There is no evidence there was any prime white oil.

By Mr. SHARTEL: I have simply used the words for the
163 initials "P. W. oil.

Q. What is the meaning of the words "P. W." as applied to an oil?
A. It means prime white, which is the name given to one variety of a refined petroleum.
Q. Now, with that explanation, I will ask you to state how the mixture stated would affect the burning quality of the liquid?

Objected to for the reason it has not been shown to be the per cent. of mixture that has been testified to. Which objection was by the Court overruled, to which the plaintiff excepted.

A. Since all burning oils called coal oils contain gasoline, when you take a variety which has a flash test of 120, which I assume to be that about which we are talking, and add gasoline to it to the amount of 4.3 per cent. or 4.4 per cent., you change it slightly in composition, make it slightly more volatile, but don't so change it as to make its classification new or to make it other than coal oil; you ask the effect of burning then upon it; it would be slightly more volatile and slightly more inflammable at high temperatures.
Q. What effect, if any would it have in reference to the safety of this oil for ordinary illuminating purposes in coal oil lamps?

A. The difference would be so slight that there would be no apparent difference in the way it burned in a coal oil lamp.

Q. You may state whether or not the mixture would be a safe mixture to use for that purpose.

Objected to as leading and incompetent, which objection was by the Court overruled, to which the plaintiff excepted.

A. It would be safe to use as a kerosene oil.

Q. You may state how that mixture compares in volatility with oils in general use throughout the United States for il-
164 luminating purposes:

Objected to as incompetent, irrelevant and immaterial, which objection was by the Court overruled, to which the plaintiff excepted.

A. Such oils are used in many parts of the country, and indeed oils containing a much larger per cent. of gasoline——

Objected to as to the competency of the witness as to what oils are used.

By the COURT: That wasn't responsive to the question, strike it out.

Q. Question repeated.

Objected to as to the competency of the witness, which objection was by the Court sustained.

By Mr. SHARTEL: Do you know the general character and qualities of illuminating oils generally used throughout the country?

A. I do.

Q. You may state how you acquired that knowledge.

A. I have acquired it by having introduced into my lab-ratory from many sources, samples from the oils made by the Standard Oil Company and their agencies in various parts of the United States; I know so by instructing in my lab-ratory, the oil inspectors of Missouri as to what their duties shall be in that state, and how their duties there compare with the duties in other states; in fact, it is my business to know the character of the oils cracked and distilled by the Standard Oil Company in Pennsylvania, Ohio, Kentucky, Kansas and Texas, and what the different merits of these oils are. These are part of my professional knowledge and experience during 25 years of the development of oil in the United States.

165 Q. Now, you may state how this mixture compares in volatility and inflammability with burning oils in general throughout the country?

A. It is about the average in volatility; there are some oils still more volatile, many which are much less volatile, but it compares favorably as a burning oil with the average oil sold for the country at large, because there are states which have no law prohibiting the sale of even lighter mixtures.

Q. You may state whether pouring a small quantity of a mixture

of the character described, running from 4.5 per cent. to 5. per cent. gasoline into a coal stove on wood and kindling, a stove with no fire in it, and without fire in it long enough to become as cool as the surrounding atmosphere which is below normal, would be likely to produce an explosion when touched off.

A. Depending on the time elapsing between the pouring and the attempt to light, and on the surface over which the given oil was allowed to flow; there would or would not be an explosion. At the temperature assumed at which a fire was needed, there would be a very little danger of an explosion if the draft of the stove were wide open. Any carlessness whatever in the use of this material, any ignorance as regards its dangers, leads instantly to explosion. The variation in the condition of that kindling and stove, as to surface and temperature, have everything to do with my answer of that question.

Q. With the same conditions, and with 122 flash test oil, what would you say?

Objected to for the reason no proper foundation is laid, which objection was by the Court sustained, to which the defendant excepted.

166 Q. Well, the ordinary oil such as is sold in Oklahoma Territory, without the gasoline mixture called for above.

A. All the oil sold in Oklahoma contains gasoline to a considerable extent already, and since the law calls for the low test of 120, which in our state would be considered low, therefore we are already talking about a substance sold in your Territory which has gasoline as an admixture and much more than 4 per cent. gasoline already in it, and the difference between such an oil as is here generally sold, and that with the 4 per cent. added or five, spread upon kindling wood, is so little in the resulting gas which would come from it, that I should think the difference was inappreciable as to the danger of explosion when a match was applied to it. In support of that answer, Mr. Shartel, I have experimented in my lab-ratory within the last week——

Objected to—sustained——

Q. Have you made any test upon the comparative difference in volatility between the ordinary kerosene and kerosene with this added mixture?

A. I have.

Q. You may state those experiments.

Objected to as incompetent, not being a test of this mixture.

By the COURT: I don't understand what kind of tests you are talking about.

By Mr. SHARTEL: The question calls for tests of the difference of inflammability between ordinary coal oil compared to coal oil with this added gasoline, actual tests of their burning quality, and how much, if any, one is any more inflammable or volatile than the other.

By the COURT: Read his question. Question read.
167 By the COURT: By added mixture do you mean the same?
By Mr. SHARTEL: Yes sir, 4½ or 5 per cent.
By the COURT: Let him answer.
To which the plaintiff excepted.

A. I have.

By Mr. SHARTEL: You may state the results of those tests.
By Mr. HUSTON: I would like to ask him first of the mixture he added. What mixture, professor, what per cent. of gasoline did you add?

A. We took given amounts of oil with 122 flash and reduced it with gasoline of 67 degree gravity until it flashed at 95 and then at 75, and then at 13, and various figures, by adding——

Q. You say you took oil——

A. I took 122 and added 4.4 per cent. gasoline.

Q. You took oil at 122 flash?

A. 122.

By Mr. HUSTON: I object to the testimony, the oil not being the same, and not a proper basis of experiment.

By the COURT: I don't understand there is any evidence yet showing what the oil was that went into the tank.

By Mr. SHARTEL: I will just ask the witness, do you know what the flash test is on a car of oil known as p. w. oil, as manufactured and sold in Oklahoma Territory?

Objected to unless he knew the flash test of this particular oil.

By the COURT: It is the oil in that tank that it must be confined to.

To which the defendant excepted.

By Mr. SHARTEL: Of course, we can put Mr. Carter on the stand now and ask him, if it is necessary.
168 By the COURT: If you want to prove those facts, you better show them.

Witness excused temporarily.

N. M. CARTER, being called and sworn as a witness for the defendant, testified as follows:

Direct examination by Mr. SHARTEL:

Q. How many cars of oil, Mr. Carter had been placed in this tank during the month of January?

A. There were two.

Q. Are these the two invoices for those cars?

A. Yes sir.

Q. Those were the cars received and pumped into that tank?

A. Yes sir.

Q. You may state whether this is the invoice received for the car of gasoline that got mixed up with this oil?

A. Yes sir, that is the invoice for that car of gasoline.

Here the same are marked exhibits "F," "G," and "H," and offered in evidence.

Objected to as incompetent, irrelevant, being self-serving declarations, part of them, and only hearsay testimony.

By Mr. SHARTEL: I simply offer them for the purpose of identification of the number of the cars.

By Mr. HUSTON: Objected to as incompetent, irrelevant and immaterial for any purpose.

By the COURT: If that is the purpose for which they are offered, they may go in evidence.

By Mr. SHARTEL: I offer them for no other purpose except to identify the number of the cars and the date of their receipt.

The same are as follows:

169 EXHIBIT F.

Corrections must be claimed on receipt of bill.

Invoice No. —. DENISON, TEX., *Jan.* 6, 1903.

M. Guthrie Stock To Waters Pierce Oil Company, Dr.

Incorporated Under the Laws of the State of Missouri, May 29th, 1900.

Subject to Sight Draft.
Iron Barrels must be emptied and returned to us promptly.

P. W. O. Tank Car #669. P. W. Oil.

Gasoline not sold for illuminating purposes in houses.

EXHIBIT G.

Corrections must be claimed on receipt of bill.

Invoice No. —. DENISON, *Jan.* 10, 1903.

M. Guthrie Stock To Waters Pierce Oil Company, Dr.

Incorporated Under the Laws of the State of Missouri, May 29th, 1900.

Subject to Sight Draft.
Iron Barrels must be emptied and returned to us promptly.

P. W. O. Tank car #390. P. W. Oil.

Gasoline not sold for illuminating purposes in houses.

170 EXHIBIT H.

Corrections must be claimed on receipt of bill.

Invoice No. —. DENISON, TEX., *Jan.* 10, 1903.

M. Guthrie Stock To Waters Pierce Oil Company, Dr.

Incorporated Under the Laws of the State of Missouri, May 29th, 1900.

Subject to Sight Draft.
Iron Barrels must be emptied and returned to us promptly.

P. W. O. Tank car #303, Stove Gasoline. 6151 Gal.

Gasoline not sold for illuminating purposes in houses.

171 Q. You may state whether the numbers of the cars given here were the correct numbers, and whether you received these cars there in accordance with that?

A. I did; these numbers correspond with the inspectors' books also.

Q. Do you know what the flash test was on the two cars of oil?

Objected to as to the competency of the witness, which objection was by the Court overruled.

A. Yes sir.

Q. How did you acquire that knowledge?

A. That is, I don't know just the exact flash test at that time, only I know none of it came under 120——

Objected to as incompetent, which objection was by the Court sustained, to which the defendant excepted.

Q. These invoices for p. w. oil I believe you said had the correct number of cars on, which you received?

A. Yes sir.

Q. How about the contents and quantity of the oil?

Objected to as immaterial, irrelevant and not responsive to any issues in the case, which objection was by the court overruled, to which the plaintiff excepted.

Q. Do these invoices correctly state the number of gallons of oil?

A. Yes sir, they correctly state the number of gallons of oil.

Q. This invoice for car No. 303, marked "gas" what does that word "gas" mean?

A. That means gasoline, what we term stove gasoline.

Q. Is this the correct car number of the car from which this mistake was made in pumping a part of it into the oil tank?

A. Yes sir.

172 F. A. ASHTON, being called and sworn as a witness for the Defendant, testified as follows:

Direct examination by Mr. SHARTEL:

Q. State your name.
A. F. A. Ashton.
Q. Where do you reside?
A. Guthrie, Oklahoma.
Q. What official position if any do you hold?
A. Territorial Oil Inspector.
Q. As Territorial Oil Inspector have you the coal oil inspector record covering inspections made during January, 1903?
A. Yes sir.
Q. Have you any record there showing the inspection of car No. 303, gasoline, on January 30, 1903?
A. Yes sir.
Q. Have you also a record showing inspection of car No. 669, p. w. oil, January 12, 1903?
A. Yes sir.
Q. And have you the record of inspection of car No. 390, p. w. oil January 15, 1903?
A. Yes sir.

Here the same are offered in evidence.

Objected to as incompetent, irrelevant and immaterial and not the best evidence, which objection was by the court overruled, to which the plaintiff excepted.

By Mr. HUSTON: I would like to ask the witness a question before it goes in.

By the COURT: Proceed.

By Mr. HUSTON: Mr. Ashton, you didn't inspect this oil?
A. No sir.

173 Q. You don't know anything about whether what is entered here is correct or not of your own knowledge, do you?
A. Nothing, only from conversation with Mr. Enochs, the man who made up the books.
Q. You have no personal knowledge of the matter at all.
A. I didn't see him make the record, no sir.
By Mr. SHARTEL: Who was Mr. Enochs?
A. A deputy oil inspector under Dillon.
Q. Under your predecessor?
A. Yes sir.
By Mr. HUSTON: Mr. Enochs was only a deputy, was he not?
A. Yes sir, he had charge of the office.
Q. Is he the one who made this record?
A. Yes sir.
Q. Is this his handwriting?
A. He told me it was, he told me — had made that record.

Defendant moves to strike out answer of the witness, which motion was by the Court sustained.

Q. Who was the oil inspector at that time?
A. John Dillon.
By Mr. SHARTEL: This record on car——

By Mr. HUSTON: I object to it for the further reason that it is not shown to have been made by the the inspector himself.

Which objection was by the Court overruled, to which the plaintiff excepted.

By Mr. SHARTEL: The record on car 669 reads as follows: Station—Guthrie; car No. 669; car initial, —; kind of oil p. w. No. if gallons, 6090; No. of barrels, —; oils rejected, 6090; specific gravity, 43.9; date of inspection, January 12, 1903; ——
By the WITNESS: These pencil figures in there I put in there myself.
174 Q. Those are entries of your own?
A. Yes sir.
By Mr. SHARTEL: Remarks; Flash test 124.
Guthrie,—station; car No. 390, initials, None—kind of oil p. w. quantity, 6051, number of barrels, —; oils rejected 6051, ——
By the COURT: Was this oil all rejected?
By Mr. SHARTEL: It is marked so on the record, yes sir. Specific gravity 44.2 Date of inspection, January 15, 1903. Flash test 120.
Car of gasoline, car No. 303, Guthrie station, car No. 303, initials —; gas, kind of oil; No. of gallons, 6151, gasoline rejected, 6151; specific gravity 67 degrees. Date of inspection January 30, 1903. No flash test.

WILLIAM M. CHAUVENET, resuming the witness stand, testified as follows:—

By Mr. SHARTEL: Have you made any experiments of ordinary coal oil of 122 flash test or thereabouts with this mixture of from 4 to 5 per cent. of gasoline, to ascertain their volatility and inflammability compared to the oil without that gasoline?
A. I have.
Q. You may state the result of those tests.

Objected to as incompetent, which objection was by the court overruled, to which the plaintiff excepted.

A. I found that in exposing 10 grams of coal oil with a flash of 122, for 15 minutes at a temperature of 70 degrees to the air, in a glass dish 2½ inches in diameter, exposing a surface 2½
175 inches wide, that that lost 3.2 parts in a thousand. Taking a mixture of 4.4 per cent. gasoline, and 96.6 part of 122 flash oil a mixture corresponding to that spoken about, that it lost 3.5 parts in a thousand with the same exposure, against 3.2 part of the original oil, that is the difference was inappreciable in the amount of gas set free by the two liquids.
Q. How much difference would that make, approximately, in the ordinary pint cup?
A. It wouldn't make any appreciable difference either, in volume;

when it comes to a temperature of an ignited match, the difference in volume wouldn't count.

Q. Taking part of the mixture that has been spoken of and putting into a stove where there is no fire, perfectly cool, and the temperature of the room below normal, the stove having remained in that room for some time and a can of this mixture standing a few feet away from the stove and allowing it to remain in the stove a few minutes before lighting it, and then touching it off, what if any likelihood would there be of an explosion in the stove?

A. Well, I think in both cases there would be considerable danger of an explosion.

Q. What do you mean by both cases?

A. Why, in the use of either coal oil of 122 flash or coal oil with 4.4 per cent. gasoline added to it when it was originally 122 flash.

Q. Well, under those circumstances would there be any difference in the amount of gas that the one liquid would generate and the amount the other would?

A. No particular difference whatever. I assume that the temperature is below 70.

176 Q. Now, under those conditions, a can of this mixture, with no opening in it only a small spout used for pouring out the liquid ordinary spout to an oil can, the can setting a few feet away from the stove, what, if any, likelihood would there be of igniting that can in the temperature spoken of?

A. In answering the question of that nature, the conditions are so many and so variable that I hesitate to give a definite answer; my opinion is that at a temperature such as that house had that morning, of less than 70 degrees, I assume that there would be little danger of lighting that can.

Q. Can coal oil or this mixture of coal oil and gasoline be ignited without coming in contact with fire?

A. No.

Q. What is the igniting temperature of gasoline and kerosene?

A. A temperature over 600.

Q. 600 degrees Fahrenheit?

A. Over 600 degrees Fahrenheit; it can stand that without ignition under some conditions; it takes a red heat, which is approximately 900 degrees to make this ignition, if it is 66 gasoline.

By Mr. HUSTON: That is without flame?

A. Without flame.

By Mr. SHARTEL: Assuming that there was some fire or coals in that stove, and that a person was in the act of pouring oil into it out of that can, what would be the probable effect?

A. An explosion.

Objected to for the reason there is no foundation laid for the hypothetical question, which objection was by the Court overruled, to which the plaintiff excepted.

By the COURT: Now you introduced evidence to show that before Mrs. Emory left the house at 8 o'clock and 5 minutes there
177 was no fire in that stove. You also introduced evidence to show that after the fire was over there was no fire in the stove,

but there was scorched paper and kindling in the stove. Now, they have got as much right to assume that she poured coal oil in the stove, and that she poured it on the paper as you would have to assume that she poured it on the open grate. It is a matter of drawing an inference from a fact.

By Mr. HUSTON: We can probably assume anything.

By the COURT: Well, assuming has been very liberal any way, so go ahead.

A. I answered it would explode.

By Mr. SHARTEL: What would be the effect on the oil can?

A. In all probability it would rupture it, blow it in pieces.

Q. What would be the effect of any explosion of that oil can in reference to tearing it apart, either from any internal explosion of gas or of the oil itself?

Objected to as to the competency of the witness, and not being a question for expert testimony, which objection was by the Court overruled, to which the plaintiff excepted.

A. The can would probably be rent in pieces; if you applied the stream to a burning fire, holding the can in the hand.

Q. Supposing the fire should be communicated to a spout of this can, to this mixture, by some means, as by the flame from the stove, and there should be an explosive mixture of gas inside the can which should ignite?

A. The same result would follow.

Q. What would be the effect on the can?

A. It would tear it apart.

Q. Which exercises the most explosive effect when once set off, kerosene or gasoline?

178 A. Kerosene.

Q. Why is that?

A. Kerosene is the heavier body and contains a greater part of explosive atoms, if I may so express it; it would make a larger volume of gas when totally volatilized than a corresponding amount of gasoline, because it is a heavier hydrocarbon, which expands to a larger volume than that of the gasoline of equal weight.

Q. What are you able to say about the report from an explosion in a stove, sufficient to tear off a door and carry the lids off?

A. I think it would make a loud sound.

Q. What about the report from an explosion that would rend an oil can?

A. It would be heard at a considerable distance.

Q. Assuming that a person were in close proximity to a stove when it exploded by either of the methods to which your attention has been called, and that person were found right in the position that she was at the time the explosion took place, what would you say as to the force or effect of the explosion itself?

Objected to as incompetent, and to the competency of the witness and as indefinite, which objection was by the court sustained, to which the defendant excepted.

Q. How violent would the explosion of a small amount of this

mixture in a stove, if it had been allowed to remain and the gas accumulate some little time before being set afire, how violent an explosion could be produced by it?

A. Depending on the amount of gas, very violent if it was a large amount of gas; less violent if the gas were less plentiful.

Q. What effect would it have as far as spreading the flames from the stove?

179 A. It would expand violently and spread the flames considerable distance.

Q. What about a mixture of this oil under the conditions stated being put into the bottom of this receiving tank here at Guthrie and allowed to remain there five or six days, then a part of it pumped off from the bottom and put into barrels, hauled to the depot and shipped twenty miles by train, then hauled to the store and poured into the tank or receptacle there, what would you say in reference to the completeness or incompleteness of the mixture?

Objected to for the reason there is no proper foundation laid for the hypothetical question, which objection was by the Court overruled, to which the plaintiff excepted.

A. All experiments with gasoline and oil prove that when gasoline is introduced at the bottom, it mixes thoroughly; when introduced at the top it mixes quietly; if there is any agitation in the barrel or tank it soon mixes thoroughly and becomes a homogeneous mass.

By the COURT: When it stands for a while, Professor, after it has been thoroughly mixed, what is the effect, does the heavier oil go to the bottom?

A. No, it no longer differentiates; if large quantities of gasoline are added it begins slowly to raise from the mixture in exposure to the air, but in a closed tank there would be no differentiation of that kind.

By Mr. SHARTEL: Take a quarter of a pint of this mixture, and apply it to wood, letting it soak in a little bit, and then lighting it, how violent an explosion would be produced from it?

180 A. In a closed stove or vessel?

Q. Yes, in a closed vessel or closed stove.

A. These are very vague questions, it is hard for one to say how violent—as I said before it would depend upon the amount of gas and the temperature which caused that gas to be generated or under temperature of 70 degrees normal, and the surface being a large one over which it was spilled, a very violent explosion might be caused in a closed stove where the draft was shut off; if the draft was open, you have a different condition; in order to answer a question of that kind all the data must be very definitely stated, in order that we may know the whole conditions under which we apply the match.

By the COURT: Wouldn't a great deal of the force of the explosion in the stove under any circumstances go up the flue?

A. No, the force is about equal in all directions from the center of ignition.

Q. Isn't it a natural consequence that where any explosion takes

place in an enclosure, that it will go — the point where it has vent or escape?

A. Yes sir, the line of least resistance would get the greater volume of the gas.

Cross-examination by Mr. HUSTON:

Q. That is, the explosion would follow the line of least resistance?

A. Yes sir.

Q. If the explosion was on the bottom of a stove or on a rock or on any solid substance and the vessel or whatever the explosion was in had some depth, why it would go upward, largely, wouldn't it?

181 A. The gaseous volume would go upward, but the pressure would be exerted downward as well as upward.

Q. But there it would meet resistance?

A. With resistance, yes sir.

Q. And if there were doors to the stove, it would pursue that line as the next weakest resistance?

A. Yes sir.

Q. Well, professor, you stated that you live in St. Louis?

A. I live in St. Louis.

Q. And how long have you been engaged in this business?

A. Of analytical chemist?

Q. Yes sir.

A. Since 1879.

Q. I understand you to state that as a part of your business, you have instructed a large number of the agents of the Standard Oil Company?

A. Not a large number, I said I had instructed the coal oil inspectors of Missouri, all of them.

Q. And instructed the agents of the Standard Oil Company?

A. No, I had nothing to do with the Standard Oil Company.

Q. Who had nothing to do with the Standard Oil Company?

A. The inspectors.

Q. I mean the agents of the Standard Oil Company, speaking about the agents of the Standard Oil Company, I understood you to say you had also instructed——

A. No, you must have misunderstood me, I have never instructed an agent of the Standard Oil Company.

Q. Are you an employé of the Standard Oil Company?

A. I am not.

182 Q. Have you been?

A. Never.

Q. Are you an employé——

By the COURT: What did you refer to when you said you had occasion to know the quality of all the oils handled by the Standard Oil Company in Missouri, Texas, Oklahoma and some other states?

A. I learned that by having them submitted through the trade, into my laboratory, not by being their agent in any sense, I was giving that as a portion of my experience in handling the oils used in America, that was what I intended to convey.

By Mr. HUSTON: Are these samples of oil submitted to you by the Standard Oil Company, is that the way you gained the information, what they handle?

A. Oh, no, they are brought by the trade, by the Waters Pierce Oil Company of St. Louis, who handle the Standard goods. A large number from grocers, some from private individuals, who deal in oil and wish to know what their qualities were.

Q. Do you know whether or not the Waters Pierce is one of the subsidiary companies of the Standard Oil?

Objected to as incompetent, irrelevant and immaterial, which objection was by the court sustained.

Q. Now taking a quantity of ordinary coal oil, 120 flash and add to it about five per cent. of gasoline, you say you would still call the mixture coal oil?

A. I would.

Q. You would classify it as coal oil?

A. I would.

Q. And now do I understand you, Mr. Chauvenet, that after adding five per cent. of gasoline to a mixture of say 120 flash
183 coal oil that it would be just as good coal oil practically, as it was before the 5 per cent. of gasoline was added thereto?

A. I said just as safe in the hands of—when properly used and burned.

Q. Now explain to the jury what causes a lamp with illuminating fluid in it, to flare up and smoke, smoke the chimney of the lamp, explain that to the jury.

Q. When the flame has sufficiently heated the metal of the lamp it may set free gas from the body of oil in the font or in the lamp proper. That vapor rises sometimes in sufficient volume to take fire and cause slight suction when it ignites, so that all the gas formed or a part of the gas formed within the lamp is exploded, and there not being enough air to properly burn it the carbon is deposited on the glass. The combustion in order that it may set free pure gases must have sufficient air. If too much of this gas has got to burn within the chimney, it throws down black soot, just as the stove will when it doesn't get enough air.

Q. Now this black soot or the black that is deposited upon the lamp chimney is the unconsumed carbon then?

A. The unconsumed carbon.

Q. Now, when oil acts in that way, is not that an evidence of too great a volatility in that oil?

A. It is.

Q. And now you take an ordinary lamp and put oil in it, and have the lamp in proper shape, the wick properly trimmed, and if it persists in smoking then you would conclude that that oil that is being burned in the lamp is of too great volatility to make good burning oil, don't you?

A. If the burner is of the proper kind, and the lamp one that under good conditions burns clearly, I should think then
184 that such was the case.

Q. And when you take a mixture of coal oil and gasoline

and put it in a lamp and every time you light it it would immediately flare up and smoke and not burn steadily, would that be evidence to your mind that that mixture was too volatile to be good coal oil?

A. It would.

Q. And wouldn't that be evidence that that would be dangerous really to use?

A. It would if all things were carefully attended to as to burner and draft.

By Mr. SHARTEL: In reference to this Abell tester, spoken of by Prof. Holter, are you able to state the difference in flashing point as given by that tester and the ordinary open cup tester?

A. I am.

Q. What is the difference?

A. The standard tester is called the Tagliabue open tester, and it gives results about 27 degrees lower than the Abell tester which Prof. Holter refers to.

Q. Lower or higher?

A. The Abell tester is—you mean which gives the lowest?

Q. Which gives the earliest flash test?

A. The Abell.

Q. The Abell tester that would flash at 37 degrees, what would the result be on the standard open tester?

A. 27 degrees higher or 64 degrees.

Q. Referring to the experiment with the distillate which he testified to, you heard that, did you?

A. I did.

Q. You may state whether that distillate which came over and denoted a test of 37 degree flash, was an oil or a gasoline
185 or a mixture?

A. It had a test of 37 by the Abell tester, and by the Tagliabue proper test or state test it would have 64, we would call that hardly a gasoline, but a low grade kerosene oil, so that the professor has distilled over not only the gasoline contained in the mixture, but a good deal of the oil compound which is properly classified as kerosene or prime white oil.

Q. This 67 degree gasoline, has it any flash test?

A. No, it flashes at all temperatures practically, down to extreme minus temperatures.

Q. Flash below zero?

A. Below zero.

Q. Do you know the specific gravity of an oil which would give that flash test of 37 degrees on an Abell tester or 64 on a Tagliabue?

A. Yes sir.

Q. What would its gravity be?

A. Well, when I said yes, I meant it is easy to acquire from the tables. I can't tell you definitely what its specific gravity would be.

Q. It would be a substantially different liquid from this 67 degree gasoline that went into this mixture?

A. Decidedly different.

Q. What is the highest heat allowable in distilling over 67 degree gasoline?

A. About 268 degrees Fahrenheit is the point where we turn or about, to get the kerosene.

Q. Where would they turn it to get the 67 degree gasoline?

A. Much sooner than that, at a much lower temperature.

Q. Can you state what temperature it would be?

A. It would be from 212 to 230.

186 Q. Then the temperature he stated at which he stopped the distillation was from 50 to 60 degrees above what would have been necessary to distill out this gasoline that went into it?

A. About that much more than necessary.

Q. And after passing that mark he was getting materials out of that oil different from what went into this mixture?

A. Different from the 67 degree gasoline that went in.

By Mr. HUSTON: Would you say any of that oil had been cracked at that temperature?

A. No, the word cracked implies breaking up of any kind; I shouldn't say any of the oil had been cracked.

Q. Must that not have been a low flash material?

A. That came over?

Q. In the oil?

A. When we use the word cracked we mean broken up, but it is not necessary to crack an oil in order to drive it over; you may drive it over without cracking it.

Q. Mustn't that then have been low flash material in the oil?

A. No, not necessarily low flash at 280 degrees, you get substances over which are no longer considered low flash.

Q. If he didn't crack it, and it wasn't low flash, how did he get it out?

A. Well, the word cracking is used for the whole process of decomposing crude petroleum. If you are going to force me to use the word creak to imply the driving over of anything except the gasoline, we consider that when gasoline itself is driven over, we are beginning the cracking of petroleum, because the whole cracking process is, from beginning to end, the breaking up of petroleum into its various compounds.

187 Q. Now, isn't it a fact that the gasoline goes off, that is, the larger part of the gasoline goes off, as a distillate, before the cracking commences?

A. True.

Q. I wanted to ask you, professor, I guess we call you all professors?

A. Yes sir, I don't hold the title.

Q. If a great deal would depend upon the specific gravity of the oil in making these tests?

A. Yes sir.

Q. And some oil while it may have a legal flash test, would be still dangerous as not possessing the proper specific gravity?

A. True, but that would be a rare occasion.

Q. And the reverse, too?

A. That would be a rare condition to find.

Q. So both these things have got to be taken into consideration in making these tests?

A. Yes sir, you must consider gravity.

By Mr. SHARTEL: This statute of 1899, professor, requires a gravity test of 46 degrees Baume scale for these oils. You may state whether the gravity as specified there has any relation either to the value or quality of the oil or its safety?

A. It has none.

Q. And has no relation to the subject either of safety or quality?

A. It doesn't so state, it has nothing to do with it.

By the COURT: What does the statutory test relate to?

A. It relates entirely as to the flash test, the amount of volatility or gases——

Q. I am not speaking about the—I am speaking about the Baume test he refers to, 46 degrees?

188 A. Pardon me, I want to get clear as to what I am asked to answer.

Q. Do you know what the Baume test is?

A. Yes sir.

Q. What is it?

A. It is a test applied by the Tagliabue instrument on the Baume scale, and refers directly to the specific gravity of the oil.

By Mr. SHARTEL: By that you mean weight?

A. The weight of the oil in relation to water, its true specific gravity in relation to water, which has a specific gravity of 1. We use an instrument called the Baume hydrometer to find it, instead of using four or five readings, we give the inspectors the privilege of using the simple numbers 4, 5, 6, 7, or 8, for instance, Judge, the Baume running 46, would show a specific gravity of 799, which would be an awk-ard figure to use.

Q. Approximately 80 per cent. of the weight of water?

A. Yes sir. And you can make many mixtures which flash at different temperatures which would not differ much in specific gravity.

By Mr. SHARTEL: The flash test is the safety test?

A. Yes sir, it is far the better way to control it.

Q. The specific gravity has nothing to do with it.

Objected to——

(Jury admonished and excused until Monday morning.)

Q. Does the relation of the specific gravity, after the flash test of the oil is found, have anything to do with the safety of the oil?

A. Nothing, it might differ materially in any two cases and yet the flash would be the same.

Q. Does it have any relation to the quality of the oil?

A. It does not. You may make mixtures of the heavy compounds at will, it is not uncommon, to add heavy oils to certain per

189 cents. of naptha, in order to make kerosene burning oil. It is not a good practice.

Q. Does it have any tendency to exclude from the market poor oil products?

A. It helps to do that.

Q. But does it do it?

A. It doesn't altogether do it.

Q. Does that requirement exclude any of the good burning oil from use?

A. Yes sir, it may exclude several of them.

Q. What ones in particular?

A. Those which come near to this line that I spoke of, where the difference is very slight, it might differentiate in favor of one or the other, but it really is not the safe basis of test.

Q. Is it a safe basis to judge burning qualities at that figure?

A. No, it is not.

By Mr. HUSTON: Taken in connection with the flash test, however, it helps to exclude bad oils?

A. I think it does, I approve its being there for that purpose.

N. M. CARTER, being called as a witness for the defendant, testified as follows:

By Mr. SHARTEL: Mr. Carter, explain to the jury how this mixture of this gasoline went into this oil?

A. You mean the way it was piped in?

Q. Yes sir.

A. The pipes are attached to our bulk car on track and conducted through those pipes to our storage tank, and when we first
190 attach to a car and to the storage tanks, we let it syphon, we start the pump and start the oil to flowing over, then it enters the storage tank at the bottom. You understand the tank car standing on the track, the oil in it is higher than the oil in the storage tank at that time when they are setting down about two feet above the ground, and the oil started to flow or gasoline as the case may be, it will syphon out of the car and into the storage tank until the two bodies come comparatively on the level, and this gasoline was syphoned or running of its own force, entering the storage tank at the bottom, where the drain pipes enter the storage tank at the bottom.

Q. Now, at what part of this storage tank did you draw this oil off that was shipped to Orlando?

A. It draws off at the bottom of the tank, from the bottom of the storage tank.

Q. How much of this mixture, Mr. Carter, was placed on the market?

Objected to as immaterial, which objection was by the Court overruled, to which the plaintiff excepted.

A. There was something over 5000 gallons; my record——

Objected to as not the best evidence——

Q. To what points was it shipped and where was it used?

Objected to as immaterial, which objection was by the Court overruled, to which the plaintiff excepted.

A. It was used at all points in my district.
Q. What does your district comprise, what towns?
A. It would comprise the city of Guthrie, Orlando, Mulhall Crescent, Cashion, Coyle, Goodnight, in fact all the towns within a compass of twenty miles around Guthrie, except Edmond, I am left out of Edmond.

191 Q. Did you make any use of this oil yourself in your own family.
A. Yes sir.
Q. How much of it did you burn?

Objected to as incompetent, and immaterial, which objection was by the Court overruled, to which the plaintiff excepted.

A. Two or three gallons.
Q. Did you burn it in ordinary kerosene lamps?
A. Yes sir.
Q. You may state what the result was.
A. I didn't notice any difference from using any kerosene oil
Q. Did you ever hear of any explosions other than the one that is charged in this case, resulting from this oil?

Objected to as incompetent, and immaterial, which objection was by the Court overruled, to which the plaintiff excepted.

A. I never heard of a single explosion.
Q. Have you made any experiments in using for illuminating purposes mixtures of oils and gasolines?
A. I have.
Q. P. W. Oil?
A. P. W. Oil.
Q. What was the highest percentage you used of gasoline with p. w. oil?

Objected to as to the competency of the witness, which objection was by the Court overruled, to which the plaintiff excepted.

A. I filled a lamp that would hold about one pint, probably a little more, in the proportion of nine parts oils and one part gasoline
Q. How long did you burn that lamp?
A. I burned it until the entire contents was exhausted. I repeated it the third time.

192 Q. Well, what was the result?
A. There was no unusual result, nothing noticeable.
By Mr. HUSTON: When did you do that, Mr. Carter?
A. I did that, let me see, refresh my memory now a little. I can give you about the time; it was either in April or May of 1903, or thereabouts.
Q. Did you have practically the same knowledge and experience of oils and gasolines in January, 1903, that you have now, practically?

A. Practically, yes sir.

Q. Now, from your knowledge of oils and gasolines, you refused to assume the responsibility of marketing this oil without direction from headquarters, did you not?

A. Yes sir. Now let me——

Q. You were afraid——

By Mr. SHARTEL: Wait a minute——

A. You asked me if I had practically the same experience in January?

By Mr. HUSTON: Yes sir.

A. I had never personally made any experiments.

Q. Now after that mixture was put in there, you wouldn't take the risk of putting it on the market without directions by headquarters, would you?

A. No sir.

Q. But when you got this letter, telling you to take the chances you took them, didn't you?

A. Yes sir.

Q. Now, you say you haven't heard of any other explosions or complaints after you put this oil out?

A. I did not.

Q. Did you hear of an explosion that Mr. John Clanch had up at Mulhall?

193 A. No sir, I did not.

Q. Did you hear of an explosion that Mr. Hetzman, also of Orlando had?

A. I did not.

Q. Did you hear of an explosion that Mr. J. K. Kinzey had at Orlando, also?

A. What dates were those explosions?

Q. Along about that time?

A. The reason I ask that question, there was another circumstance later up at Orlando that the merchants——

Q. I am talking about Mr. J. B. Kinzey, out of that same shipment of oil?

A. About that time?

Q. You heard of that then did you?

A. No sir, I did not.

Q. Did you hear about the explosion that Mr. James Mabon had out of that same shipment of oil?

A. No sir.

Q. Did you hear about the explosion that ocurred out in a school house where they were using some of this oil between Orlando and Marshall?

A. I did not.

Q. Did you hear of an explosion that Mr. Ralph Carlin had, of the oil flaring up in the chimney and having to throw the oil out?

A. I did not.

Q. And don't you know as a matter of fact, that while you were taking your chances and working off that mixture of coal oil and

gasoline, that pretty near everybody in the town was wondering or complaining about that oil?

A. I heard nothing of it.

Q. You didn't?

194 A. I didn't.

Q. In a few places that they had nothing that would burn at all, didn't you hear about that, don't you know there was a general complaint at that time, and numerous explosions and flaring up of lamps?

A. I heard of one.

Q. What one was that you heard of?

A. That was at Jim Jonston's, and if I would be allowed to explain, Mr. Houston told me personally——

Q. Never mind what he told you.

A. That it wasn't this oil.

Q. Did you have some other oil of the same character that you put upon the market?

A. No sir.

Q. You didn't?

A. No sir.

Q. Now as soon as you heard about this explosion at Orlando, you called all that oil in, didn't you?

A. Yes sir.

Q. And didn't put it on the market again, did you?

A. No sir.

Q. Now, whatever your theories may have been when you heard of that fact, you called the oil in and didn't put any more of it out?

A. I did not.

Objected to as incompetent, irrelevant and immaterial and not proper cross examination, which objection was by the Court sustained.

Q. As a matter of fact all of that oil had been rejected before the mixture, hadn't it?

A. No.

195 Objected to as incompetent, irrelevant and immaterial and not proper cross examination, which objection was by the Court overruled, to which the defendant excepted.

Q. That 6000 gallons of coal oil had been rejected by the oil inspector had it not?

Objected to as not the best evidence, which objection was by the Court overruled, to which the defendant excepted.

Q. That particular oil had been rejected by the coal oil inspector of the Territory had it not?

A. Yes sir.

Q. And that gasoline had been rejected by the coal oil inspector of the Territory had it not?

A. No, I think not.

Q. Well, ain't that of record?

A. I don't know what his records show on the gasoline.

Q. And notwithstanding the rejection of the entire amount you mixed it with gasoline and then put the mixture on the market, didn't you?

A. The mixture went on the market.

Q. Do you know or not whether the gasoline was also rejected?

A. I don't.

Q. You don't know about that, but if it was rejected, why it didn't make any difference, you put it on the market just the same, is that right?

A. Yes sir.

By Mr. SHARTEL: Mr. Carter, do you know what the method of the inspector was at that time about rejections?

A. I do.

Q. Do you know of the fact of a controversy having arisen about the application of the gravity test with the inspector?

196 A. I do.

Q. Do you know why these rejections were made?

Objected to as immaterial, which objection was by the Court sustained, to which the defendant excepted.

Q. You may state if you know whether this rejection was made on acount of anything that pertained to the sales of these oils or whether it was on account of their gravity?

Objected to as incompetent, and immaterial, which objection was by the Court sustained, to which the defendant excepted.

ALEXANDER P. ROBINSON, a witness for the defendant, being called and sworn, testified as follows:

Direct examination by Mr. SHARTEL:

Q. State your name.

A. Alex. P. Robinson.

Q. Where do you reside?

A. St. Louis, Missouri.

Q. What business are you engaged in?

A. Engaged by the Waters Pierce Oil Company.

Q. In what capacity?

A. In a general capacity at the present, but for about 20 years I was in charge of the shipping department and their works at St. Louis, Missouri, and East St. Louis, Illinois.

Q. What experience have you had in the handling of the various products of petroleum?

A. A very wide experience, covering about 20 years' time, covering the handling of very large quantities of petroleum and its products.

Q. Are you familiar with the various grades of oils manufactured in this country?

197 A. Quite generally familiar with them.

Q. Are you able to state what if any influence the gravity

of the oil or weight of oil has either upon its safety or its burning qualities?

A. I am.

Objected to as to the competency of the witness, which objection was by the Court sustained, to which the defendant excepted.

Q. You may state whether the imposed specific gravity test of 46 degrees Beaume scale, whether you know whether it has any relation whatever either to the safety or to the quality of the oil?

Objected to as immaterial and to the competency of the witness——

By Mr. HUSTON: I don't particularly object to his answering that question, yes or no.

A. I am able to state.

By Mr. SHARTEL: From what experience do you derive your information?

A. From practical experience and experience in having made a number of tests, both practical tests and tests in our small laboratory at the work.

Q. Are you familiar with the safety and burning qualities of the various grades of kerosene produced in this country?

A. I am, I have handled large quantities of oils produced from different sections of the country.

Q. Do you know the gravity of those oils?

A. I do.

Q. Do you know the burning qualities of the oils?

A. I do.

198 Q. Do you know the safety of the oils?

A. I do.

Q. You may now state whether the gravity test of 46 degrees has any relation to the safety or the quality of the oil?

Objected to as incompetent, to the compentency of the witness, and it being wholly immaterial, which objection was by the court overruled, to which the plaintiff excepted.

Q. You may state whether you are familiar with the composition of these various oils and burning fluids?

A. Do you mean chemically?

Q. Chemically and their physical properties as well?

A. I am thoroughly acquainted with their physical properties; one of my main duties for a number of years was to determine whether their physical properties were such that we would accept them for the market and market them without fear of complaint from the trade.

Q. What are the tests ordinarily applied to oils in determining their qualities, are they chemical or physical in their nature?

A. They are physical in their nature; for illuminating oils the main tests we apply are lamp burning tests to determine the illuminating power and the incrustation on the wick and the de-

posit on the chimney, and the rapidity with which the fluid is consumed at a given temperature.

Q. What are the various tests applied for determining the safety of the oil?

A. The flash test and fire test only.

Q. You may explain what you mean by flash test and the fire test?

A. The flash test is the point at which the first flash is obtained from the vapor arising from the oil that is heated under cer-
199 tain prescribed regulations and a taper applied under the same regulations. The fire test is the point at which the same fluid, when the temperature is increased, will ingite and stay ignited until put out by some outside means.

Q. The one then tests what temperature gives off gas enough to burn?

A. The flash.

Q. And the other is the temperature that you have to raise the liquid to to itself burn?

A. To get the liquid itself to burn.

Q. How long have you been engaged in making these various tests of oils?

A. About 21 or 22 years.

Q. What tests in the way of a physical inspection of the oil itself is resorted to in determining its burning qualities?

A. The tests that we make, that is, that I have had made as an employe of the Waters-Pierce Oil Company, are physical lamp burning tests.

Q. What is understood by the term viscosity?

A. The refers to the body of the oil, to its viscus property or the property that allows it to flow through a given surface or through a given means of conveyance, at a greater or less rapidity.

Q. Is that test resorted to?

A. By the refiners but not ordinarily by the miners.

Q. Now, you may state if you know whether the specific gravity when the flash test is once ascertained, has any relation to the subject of the inflammability of the liquid?

A. Not the slighest.

Q. Is it true in general that heavier liquids are in a general way less inflammable than lighter liquids?

200 A. In general, yes sir.

Q. Is that true in regard to any particular comparison or is it only a very general rule?

Objected to as leading, which objection was by the Court sustained, to which the defendant excepted.

Q. How closely can that rule be applied?

Objected to as assuming——objection withdrawn.

A. Not very closely.

Q. Do the attributes of oils of the same qualities vary according to the locality in which they are produced?

A. Very much.

Q. You may state some of the variations.

A. Oils produced, the fine oils produced from Pennsylvania crude show a higher reading when tested with the Baume hydrometer than oils produced from the Ohio crude. They likewise show a higher reading than the oils produced from the Kansas and Territory crudes. They also show a higher reading than the oils produced from the crudes produced in the vicinity of Beaumont, Texas; at a variation of from 10 to 12 degrees in gravity between the oils in the different localities.

Q. And what variation in flash test?

A. No variation, except that different flash tests are made, and some in different sections of the country too are practically almost the same gravity.

Q. You mean to say that oils produced in different parts of this country, showing the same flash test, say 120 degrees will differ as much as 10 to 12 degrees in gravity?

A. Yes sir.

Q. Well, take the oils refined from the Kansas crude, what gravity do they show?

A. From 41½ to 42½ as commercially used.

201 Q. What is the specific gravity of the Texas oil, showing a flash test of 120.

A. From 38½ to 40½; they range generally from 39 to 40. That is the oils produced in the vicinity of Beaumont; oils produced by Corsicana, Texas, are of different gravity again.

Q. Of what gravity?

A. From 43 to 45 and 46.

Q. What about the Ohio oils?

A. The Ohio oils are from 43 to 46 and 47, depending on the grades.

Q. And the Pennsylvania?

A. From 44 or 45 to 49 approximately.

Q. Now, does this weight, as applied in these tests, denote anything in reference to the variety of the oils?

A. It does not, that is, in comparing oils from different sections of the country.

Q. Is there any difference between—in respect to sa ety, between the Pennsylvania oil showing a specific gravity of 47 or 46, and any other oil having a gravity of 44, and both having the same flash test?

A. No difference at all in the safety.

Q. Is there likely to be any difference in the quality of oils manufactured in that way?

Objected to as leading and indefinite, which objection was by the Court sustained, to which the defendant excepted.

Q. What if any difference might exist in the burning qualities of the oil?

A. Practically no difference between oils of similar grades. We have discovered this in numerous tests, that some of the heaviest

gravity refined oils produced are the freer burners and the best illuminant.

202 By Mr. HUSTON: How is that?

A. We have found that some of the heaviest gravities produced are the freest burners and best illuminants, in other words, oil that is produced from Kansas crude are better illuminants and freer burning oil than the oil produced from Ohio crude, which is several degrees lighter in gravity.

By Mr. SHARTEL: That is from actual burning tests?

A. From actual burning tests which we determine as to whether the oil is marketable.

Q. Those tests involve first quantity of light produced?

Objected to as leading——

Q. What do those burning tests involve that you speak of?

A. They involve the amount of oil consumed in a given time, and a given temperature; the- involve the amount of incrustation on the wick and the clearness or cloudiness of the chimney, and the distance that the flame drops in height during the time that the test is made.

Q. Well, now, are those all of the things that go to make up what we call the burning quality of an oil or are there any other elements that enter into it?

A. They are all that go to make it up in actual practice; we make these tests to determine as to how they will suit the consuming trade, in actual consumption. A certain portion of refiners work to certain specifications in the nature of viscosity, color, etc.

Q. Do you know whether the quality of the oil of a given flash test and a given specific gravity, is controlled by either of these factors, or whether it is controlled by methods of manufacture in removing foreign substances from the oil?

Objected to as leading——

203 A. I do know.

Q. You may state.

Objected to as immaterial and leading, which objection was by the court overruled, to which the plaintiff excepted.

A. The refiners in distilling oils take considerable pains to not undertake to get too much a production from their stills, which would interfere with the burning qualities of the oil; in treating them they undertake to bring about a certain color which is recognized in the trade as one of the standards, and to eliminate all foreign matters such as parra-fine, sulphur, or other matters that get in the oils, asphalt in one of them.

Q. Have you made any tests of what is called p. w. oil when mixed with gasoline?

A. I have.

Q. You may state the result of those tests.

Objected to as incompetent,—question withdrawn.

Q. Coming back to the question of gasoline, what tests if any are applied to gasoline, how is that classified?

A. The gravity test is applied, but the main test is to determine whether the gasoline has any oil in it, and how freely it burns in vapor stoves and lamps. Some gasoline burns and will leave a carbon deposit or a coke deposit in the small orifices and small tubes in stoves and lamps which renders it objectional to the trade.

Q. Does the particular gravity of the gasoline influence the amount of soot or deposit that is made?

A. Not altogether, not as comprising gasolines produced in different sections of the country.

Q. Does the same kind of variation come in there?

A. Yes sir.

204 Q. Are you able to state which is the safest gasoline to burn for domestic uses, the 67 degree specific gravity or the 70?

A. There is no difference in the safety if they are used the same and under proper conditions; I always use 76 myself in my stove.

Q. Which would be the most likely to produce accidents if improperly used?

A. The lighter gravity being nearer gas.

Q. Gas more inflammable?

A. More inflammable.

Q. Now, coming back to the experiments you have made with the mixtures, state the result of those.

Objected to as incompetent, no proper foundation having been laid, which objection was by the Court overruled, to which the plaintiff excepted.

A. I made numerous mixture of different quantities of 122 flash test prime white oil, and 67 degree or 68 degree gravity stove gasoline; by compounding the two fluids, I made an oil that would flash at 95 degrees Fahrenheit when tested in the open Tagliabue cup; I also made an oil that would flash at 75 degrees when tested in the open Tagliabue cup; that took a little over four per cent. of gasoline to a little less than 96 per cent. of oil; I had the oils burn in ordinary glass lamps with common chimneys and burners and wicks, and they were burned without any accident, with perfect safety.

Q. Are you able to state whether a mixture of 95.6 per cent. of P. W. Oil possessing a flash of 120 or better, when mixed with 4.4 per cent. of 67 degree gravity gasoline, is a safe or an unsafe mixture to use for ordinary illuminating purposes?

A. It is perfectly safe to use for our illuminating purposes.

Q. Do you know of oils of equal volatility to that being generally sold and used for such purposes?

205 Objected to as leading, which objection was by the Court sustained, to which the defendant excepted.

Q. Do you know anything about the general use of oils of such volatility for illuminating purposes?

Objected to as leading, which objection was by the Court sustained, to which the defendant excepted.

Q. Have you any knowledge in reference to the use of similar oils to that?

Objected to as immaterial and leading, which objection was by the court sustained, to which the defendant excepted.

Cross-examination by Mr. HUSTON:

Q. Mr. Robinson, if I understand your answers, you made a test of mixing these coal oils and gasoline in different quantities?

A. Yes sir.

Q. And that you made a mixture of these two fluids with the gasoline something over 4 per cent. and the coal oil about 96 per cent. or a little less?

A. Yes sir.

Q. And that that mixture showed a flash test of 75 degrees in an open cup tester?

A. Yes sir.

Q. Now, do you desire to be understood as giving it to be your opinion that a fluid that would flash at 75 degrees, is a prefectly safe illuminating fluid?

A. From the fact that they burn it and have burned it——

Q. Well, never mind, just answer the question, whether it is, whether you desire to be understood as so testifying?

A. If used in the proper manner, yes sir.

Q. What kind of a lamp did you say that you would have to use that kind of a mixture in?

206 A. A glass or metal lamp, any kind of a lamp; it must have the proper kind of a burner.

Q. Then the law in your opinion that prescribes a flash test of 120 degrees, is wholly useless and unreasonable, is it?

A. Wholly useless and unreasonable.

Q. Now, all the states in the Union prescribe flash tests and specific gravity tests also, do they not?

A. They do not, sir.

Q. Most of them do, don't they?

A. I know some that don't. And some prescribe very much lower flash tests than are prescribed in this Territory.

Q. I am taking in the first place now, the majority of the states, most all of them prescribe the specific gravity tests as well as the flash test?

A. There is very few prescribe the specific gravity test, the only one in which the Waters Pierce Oil Company does business that prescribes the specific gravity test is Oklahoma Territory, Missouri, Arkansas, Louisiana, Texas, Indian Territory, do not prescribe the specific gravity test.

Q. Don't the states prescribe the specific gravity test?

A. I never heard of anyone that was state laws.

Q. Now, whether they are prescribed or not, it don't make any difference to the oil company, does it?

A. I am not here to answer that question.

Q. Do you also give it as your opinion that the specific gravity doesn't even assist in determining the purity of the oil?

A. That is rather an indefinite question.
Q. Well, now, can you answer it?
A. I can.
Q. Well, answer it please?
A. I will have to elaborate on it somewhat.
207 Q. I would like a direct answer first, and then elaborate after.
A. I gave a direct answer, I can.
Q. Go ahead.
A. As explained before in my testimony, specific gravity of oils produced from different crudes——
Q. Now wait, answer my question directly first, then explain afterward.
A. Please read it.
Q. Question repeated.
A. I cannot answer that question unless I can make an explanation along with it.
Q. Make all the explanation you want to afterward, but I would like for you, if you can now, to answer the question first, and then make your explanation.
A. I can answer that.
Q. I have asked you two or three times to.
A. I am trying to answer you frankly, and still I am trying to bring the point out I want to make.
Q. Answer me frankly first and then make the point you want to make afterward.
A. I answered that, that it does not determine the purity of the oil when you put oil produced from different crudes in comparison.
Q. Now, my question is, doesn't the specific gravity test assist in determining the purity of the oil, together with the other tests?
A. Of an oil produced from the same crude it does assist, and of oils produced from different crudes it does not assist.
Q. Now, would the mixing of ten per cent. of lubricating oil with 90 per cent. of illuminating oil, affect the illuminating oil in any way?
A. Very seriously.
208 Q. Would that change the specific gravity?
A. It would change the specific gravity and would also change the viscosity so materially that the oil wouldn't flow up the wick.
Q. Would five per cent. of lubricating oil change the quality of burning oil?
A. Yes sir.
Q. Could that be discovered by applying the test of specific gravity?
A. It would be discovered primarily by taking the color of the oil.
Q. I didn't ask you how else you might, answer my question?
A. It can be, yes sir.
Q. So then the specific gravity would be one of the tests that would discover that impurity would it not?

A. It would be one of them, yes sir.

Q. What is it that causes the incrustation on a wick, in your tests?

A. It is the amount of foreign matter that is left in the oil, either para-fine, sulphur; and asphalt, the parts in commercial practice that are not thoroughly eradicated.

Q. Does the amount of para-fine and those foreign substances affect the specific gravity of the whole combination?

A. Slightly, yes sir.

Q. Then in applying the test of specific gravity one would discover that, would he not?

A. Not if the oil didn't have already a para-fine base to it.

Q. Well, I am taking it now——

A. If it came from an asphalt base it would be very different.

Q. Just take a schale oil and mix para-fine with it?

A. We don't handle schale oils in this country.

209 Q. Well, take any kind of oil and mix para-fine with it, wouldn't it be discovered by this specific gravity test, wouldn't it change the specific gravity, in other words?

A. It would change the specific gravity, yes, sir.

Q. And it would also affect the burning quality, wouldn't it?

A. It would, some.

Q. What is it that makes an oil, when burned in a lamp, give forth a yellow flame?

A. The grade of it.

Q. Well, what substance therein would cause that?

A. Some of these impurities that we have mentioned.

Q. Well, mention some of them again.

A. Para-fine or asphalt or sulphur. In refining oils there are produced, grades produces, water, white oils, standard grade or prime white oils.

Q. Then I understand you that the para-fine, or asphalt or other impurities, would change the specific gravity of the mixture?

A. Yes sir.

Q. Then the test of specific gravity would determine that impurity, wouldn't it?

A. To some extent, not altogether.

Q. How do the refiners vary the product of petroleum in the still?

A. They give out,—as the still starts to flow, they give out the light properties first, the gasoline and naptha distillate, and then the water white oil distillates, and then the prime white oil distillates.

Q. When they begin to distill petroleum, does the amount of petroleum, the amount of kerosene that they obtain, exist there as such to begin with?

Q. How do you mean? Some oils are distilled by the ordinary distilling process and some by the cracking process.

210 Q. Suppose they get 60 per cent. of kerosense, did that exist there as such in the petroleum?

A. That is a chemical question that I am not prepared to answer.

Q. Now, as I understand you then, you have no knowledge of the chemistry of the subject?

A. I so stated at first, only the practical side of the question.

Q. Your experience goes to lamp burning and observing the flame and the black on the lamp and the incrustations on the wick and things of that character?

A. Which are the questions that the trade determines a quality of the oil by.

Q. Now, Mr. Robinson, when a lamp is lighted and it flares up to the top of the chimney and smokes the chimney, goes clear up above the top of it, what do you say causes it?

A. Almost invariably and from numerous investigations that have been made, the cause is due to defective burners or wicks and not to the test of the oil.

Q. Take the regulation Rochester burner with a new wick, and the lamp and burner clean, what qualities in the oil would cause that?

A. That is caused in the first place, there are always defective articles manufactured irrespective of their brand; in the second place you can cause that by shutting off the access of air through the burner and cause intense smoke and flaring up.

Q. Now assuming a perfect burner, you are proceeding to discuss questions that I have already given you, take a perfect burner and a perfect wick?

A. You asked what caused the trouble and I told you.

Q. I asked you what in the oil would cause that, assuming that you had a perfect burner and a perfect wick, what qualities or impurities or what characteristics in the oil would cause a
211 lamp to flame or flare up in the manner I have indicated?

A. I have never seen such conditions with perfect lamp equipment; I have seen such conditions with imperfect lamp equipment; burning the same oil in one lamp and in another lamp and got totally different results.

Q. Did you use Waters Pierce Oil when you did that?

A. Always did.

Q. Or Standard Oil?

A. I have used a great many other oils too in making these tests.

Q. Do you say that that would not be occasioned or would not be occasioned by the character of the oil?

A. I did not, I said I had never seen that.

Q. You say you had never seen it?

A. It never came under my observation.

Q. Now, a mixture of coal oil and gasoline could easily cause that?

A. In what percentage?

Q. In any percentage?

A. No sir, not in any percentage.

Q. Suppose you undertook to burn gasoline in a coal oil lamp, what would be the effect?

A. I never would undertake to do it, and never have undertaken to do that.

Q. You wouldn't be afraid to do that?

A. Yes sir, I would be afraid to do that.

Q. Take an oil, or a mixture of oils, put it in a regulation lamp, good burning lamp, no defect in the lamp or no defect in the wick, and let the flame then flame up to the top of the chimney, and smoke the chimney, get burnt, what would you say as to whether that oil was perfectly safe or whether it was dangerous?

A. I should say there had been, undoubtedly was, too great a wick exposure; that happens in houses every day.

212 Q. Now you understand my question, don't you?

A. I certainly do, and I answered it.

Q. You understand that I have assumed that the lamp and wick was perfect?

A. In good condition, yes sir.

Q. Not a wick turned away up.

A. You didn't say that, you asked me what would I say, I said I would say there was too great a wick exposure.

Q. Assume the lamp and wick to be in perfect condition, and an oil that would do that, do you understand that?

A. I understand that.

Q. Well, answer whether that oil in your judgment would be safe as an illuminating oil or not?

A. I have never seen any such oil or experimented with it.

Q. Answer that question if you can?

A. I can't answer that, I can't answer to something I haven't seen.

Q. You said that the laws of the different states vary some in regard to the degrees of the flash point?

A. Yes sir.

Q. That is ordinarily governed by the altitude, isn't it?

A. No sir.

Q. Now in warm countries the flash point should be higher, should it not?

A. Not at all, in Texas——

Q. I am not asking you now what Texas is, I say ordinarily they intend to have it so that the flash point will be above what the ordinary temperature may reach?

A. I have no way of determining what the legislatures wish to determine or what regulations they expect to make.

213 Q. From your own knowledge of oils, you say you have been in the business for 20 years?

A. Yes sir.

Q. What do you say yourself as to whether the degree of temperature should be higher or lower in warm countries?

A. I say it is absolutely immaterial when used under proper conditions.

Q. You are opposed to any flash test at all, ain't you, or any other kind of a test?

A. I didn't say that at all.
Q. You are an oil man and you don't want any test, do you?
A. I don't say that, haven't said that.
By Mr. SHARTEL: Coming back to this gravity question, Mr. Robinson, if you were to put your Baume scale into a sample of oil, and it should read 44 degrees, and you didn't know where the oil came from or where it was produced, what if any information would that give you?
A. Give me no information at all.

Objected to as immaterial and improper redirect examination, which objection was by the Court overruled, to which the plaintiff excepted.

Q. If you knew that an illuminating oil was produced in Kansas, and it should show a specific gravity of 40, would that give you any information as to the oil?

Objected to as immaterial, which objection was by the Court sustained.

Q. As a matter of fact, if you knew beforehand the place where the oil was produced and what specific gravity you ought to expect from that oil, and would then apply your gravity test, it would give you some information under those circumstances?

214 Objected to as leading and immaterial——

Q. And indicate something of the quality or the flash test of the oil?

Objected to as leading, which objection was by the Court sustained, to which the defendant excepted.

Q. Counsel asked you whether the specific gravity would be some aid, under certain conditions, in ascertaining what the oil was, now I will ask you to state fully what those circumstances are, and wherein the specific gravity test would give you any information or knowledge of the characteristics of the oil?

Objected to as improper redirect examination, which objection was by the Court overruled, to which the plaintiff excepted.

A. I would have to know first where the oil came from and what gravities we would ordinarily expect to receive from that refiner, and under those conditions the gravity test would deteemine or would help to determine in regard to the quality of the oil, but wouldn't determine as to the flash test of the oil.
By the COURT: Do you mean to say Mr. Robinson, that the oil inspector of the Territory of Oklahoma, who is not engaged in the oil business, and has no knowledge of where the oil he is testing comes from, would obtain no information at all as to the character or quality of the oil by taking its specific gravity?
A. He would obtain no information at all as to its quality as an illuminant.
Q. Which is the best illuminant, light oil or heavy oil?
A. That depends altogether upon the section that it comes from;

if it is produced from the same crude the lighter oil is the better illuminant; if produced from different crudes you can get a better illuminant than some of the light oil, from the heavier oil.

Q. Which is the most volatile, the heavy oil or light oil?

215 A. That is also determined upon the kind of crude it is produced from; the fire test will also affect that.

Q. Well, taking it from the same crude, which is the more volatile, the heavy or light?

A. The light is the more volatile.

Q. In gasolines?

A. The lighter gasolines are more volatile.

Q. Is there more danger of an explosion from a light body than there would be a heavy, of gasoline?

A. More danger of inflammability.

Q. Well, the higher the volatility and inflammability, the greater the danger?

A. Within certain limits, that is, we sell a grade of gasoline for instance that has 87 degrees Baume gravity that we wouldn't undertake to let anybody use in their stoves or automobiles or in lamps, it is sold for gasoline purposes only, we consider that very dangerous; so that ordinary laymen couldn't undertake to use it. When you get into the stove gasoline or stove naptha the difference of inflammability between the degrees of gravity is almost infinitessimal.

Q. What is the average specific gravity of stove gasoline that you put on the market?

A. That depends on where they come from; gasolines that come from Pennsylvania crude will be 69 to 71 gravity; from Ohio crude, will be 66 to 68 or 69 gravity; and from Kansas crude, will be probably 65 to 66½ gravity, and Beaumont, Texas, crude the same way.

By Mr. SHARTEL: These different gasolines you speak of coming from these different localities, are those equivalent in burning qualities or are they manufactured to different standards of burn-

216 ing qualities?

A. They are equivalent in burning qualities, manufactured for the same purposes.

Q. I understand that the way you intend to sum this whole business up, is that the specific gravity of the same crude product, oils made from it, the lighter those oils are from that product, the more inflammable?

Objected to as leading, which objection was by the Court sustained, to which the defendants excepted.

By Mr. HUSTON: I want to ask you Mr. Robinson, what other tests are applied to gasoline besides the specific gravity test?

A. We undertake to determine the presence of oil.

Q. Well, I mean in the different states, by the laws of the states, or do you know?

A. I don't know of any other state where we transact business that undertakes to regulate the gravity or quality of gasoline.

Q. Why is it that gasoline, 87 degrees Baume, is not put upon the market at all?

A. It is put upon the market, but for special purposes.

Q. But not held in stock for use in the general trade?

A. The general trade would have no use for it, it is not a standard product to use for ordinary stove or gasoline lamp business.

Q. Why, because it is too light or too volatile?

A. Yes sir, too volatile and too expensive.

Q. And that is determined by the specific gravity, isn't it?

A. That is determined by the specific gravity, it is one of the lighter products of the still.

Q. How long did you say you have been employed by this Waters Pierce Oil Company.

217 A. 23 years.

Q. Still employed?

A. Yes sir.

The defendant here rests.

GEORGE L. HOLTER, being recalled in rebuttal by the plaintiff, testified as follows:

Direct examination by Mr. HUSTON:

Q. Professor, I desire to call your attention to the testimony of Professor Chauvenet as to certain experiments made by him in which he states substantially that in exposing 10 grams of coal oil with a flash test of 122 degrees for 15 minutes at a temperature of 70 degrees to the air in a glass dish, 2½ inches in diameter, and lost 3.2 parts in a thousand, and then afterward took a mixture of 4.4 per cent. gasoline and 96.6 per cent. coal oil, which would make 101 per cent., really, of 122 degree flash coal oil, which sustained a loss of 3.5 parts in a thousand under the same circumstances, the same surface, and same time, I desire to ask you first whether or not the loss sustained in the first minute would be greater or less than 1/15 of the loss sustained in the whole 15 minutes or whether the main part of the loss would be sustained in the first minute or two?

Objected to as incompetent, irrelevant and immaterial, and improper rebuttal testimony, which objection was by the Court overruled, to which the defendant excepted.

A. The fact that it loses, according to the testimony, indicates that there is some material there that will pass off at the temperature, will evaporate at that temperature, and the ratio will not be direct, that is, it will lose more the first minute than it would the

218 second, and it will lose more the second than it would the third, and so forth; inasmuch as the evaporation takes place over the surface of a liquid, and when the volatile material evaporates from the surface other volatile material comes to the surface to take its place, so it is not fair to say that if it loses three and a fraction parts in 15 minutes that it will lose 1/15 part of that in any one minute, it will lose more.

Q. Now, professor, using the test as testified to by Mr. Chauvenet, as a basis, what volume of gas would be generated in a stove from a quantity of this mixture of the ordinary amount that is used to

kindle a fire, pouring it over the rough surface of wood and kindling that it would ordinarily expand over, within a period of two minutes say?

Objected to as incompetent, irrelevant and immaterial and not proper rebuttal evidence, having been fully covered by examination in chief, which objection was by the Court sustained, to which the plaintiff excepted.

Q. Take coal oil at a flash of 122, and expose it to the air for a couple of minutes, state whether in your judgment a sufficient amount of vapor would be generated to make it dangerous or not?

Objected to as incompetent, irrelevant and immaterial, not proper rebuttal, having been covered in chief, which objection was by the Court sustained, to which the plaintiff excepted.

Q. State whether or not with an exposure of two minutes instead of 15 minutes, the difference between the loss sustained, using his language, or the amount of vapor generated, would be greater between a coal oil of 122 flash and the mixture that has been
219 described at an exposure of two minutes than at an exposure of 15?

Objected to as incompetent, irrelevant and immaterial and not proper rebuttal, which objection was by the court overruled, to which the defendant excepted.

A. The lower the flash point of course the greater will be the evaporation; if the mixture has a lower flash point than the kerosene, the mixture would evaporate and form more vapor in a given length of time than the kerosene would form.

Q. Then your answer before that more would evaporate in one minute than in two, and more in two than in three, the difference would be greater——

Objected to as leading, which objection was by the Court sustained.

Q. Then state whether or not the difference would be greater with an exposure of two minutes than an exposure of 15?

Objected to as incompetent, irrelevant and immaterial, the competency of the witness not being shown, and as improper rebuttal, having been covered in chief, which objection was by the Court overruled, to which the defendant excepted.

A. The rapidity of evaporation would be the greatest at the beginning, and would constantly diminish as the time is extended.

Q. Now, professor, you heard Mr. Robinson's testimony to the effect that he had made an experiment of mixing coal oil and gasoline in about the proportions as have been testified, and that the mixture flashed at 75 degrees Fahrenheit, open cup tester; tell the jury whether or not in your judgment such a mixture would be dangerous for illuminating purposes or otherwise?

Objected to as incompetent, irrelevant and immaterial and not proper rebuttal, having been covered in chief, which objection
220 was by the Court overruled, to which the defendant excepted.

A. It would be highly dangerous to use in a burning lamp.

Q. I want to ask you concerning the Abell tester which you say you used, where it is used, and why?

Objected to as incompetent, irrelevant and immaterial and improper rebuttal, which objection was by the Court sustained, to which the plaintiff excepted.

Q. State whether an open cup tester or the closed cup tester, which is the Abell tester, more nearly corresponds to the conditions in a lamp.

Objected to as incompetent, irrelevant and immaterial and improper rebuttal, which objection was by the Court overruled, to which the defendant excepted.

A. The Abell tester approaches the conditions in a lamp?

Q. That is the closed tester?

A. That is the closed tester.

Q. Now take coal oil or a mixture of coal oil and gasoline that would flash in an open cup tester at 75 degrees Fahrenheit, put it in a closed tester, like in a lamp, what degree would it have to sustain according to the difference between the testers?

Objected to as incompetent, irrelevant and immaterial and improper rebuttal, having been gone over in chief, which objection was by the Court sustained, to which the plaintiff excepted.

Q. I will ask you one more question, professor, taking a mixture of coal oil and gasoline, and put it in a lamp, and find that it would flare up to the top of the chimney every time you lighted it, state whether or not such a burning fluid is dangerous or safe?

221 Objected to as incompetent, irrelevant and immaterial not proper rebuttal, and part of plaintiff's case in chief, which objection was by the Court overruled, to which the defendant excepted.

A. Assuming that the lamp, that the burner is a good burner, and has the proper draft, and the wick vents, or place for the wick properly, the lamp begins to burn up, and flare up, I would say that it is dangerous fluid to use.

Defendant moves to strike out the answer of the witness as incompetent, and immaterial, as a part of the plaintiff's case in chief, and not proper rebuttal evidence, which objection was by the Court overruled, to which the defendant excepted.

Cross-examination by Mr. SHARTEL:

Q. Professor, how much faster would this evaporation occur in the first minute than it would in the other fourteen?

A. There would be no direct ratio inasmuch as I don't have any specific data as to the depth of the liquid, neither do we have any specific data of the volatility of the gasoline used; we may use a highly volatile gasoline or one that is not as highly volatile.

Q. Well, if the two liquids stand side by side, one of them mixed with gasoline and the other free from it and the one of them gives

off a certain quantity in 15 minutes, and the other gives off a certain quantity in 15 minutes, have you or have you not established a relative data of the volatility of the two liquids.

A. You can't get the direct data, no sir.

Q. Well, but have you established the relative data between the two?

222 A. No, you couldn't establish the relative data between the two for this reason, the one containing the volatile liquid, the gasoline, will evaporate in the ratio directly dependent upon the high or low volatility of that material.

Q. But suppose, as is shown, that the coal oil itself contains the gasoline, contains those same elements?

A. The coal oil itself always contains, as has been testified to by both of us, a little gasoline. The coal oil that flashes at say 100 degrees contains an excessive amount of gasoline over a coal oil that flashes at 120 degrees or at 110 degrees or at 101 degrees, if you please, so we couldn't get a direct proportion.

Q. It does establish their relative volatility under 15 minutes exposure, doesn't it?

A. I couldn't say that I could get the direct ratio.

Q. Well, if they particularly varied it does give a relative ratio?

A. Relative? That, Mr. Shartel is entirely too relative to answer. If you want to say ratio of six to eight, or one to four, that is definite and that is a thing I couldn't say.

Q. Well, it shows one thing, that one of them will give off so much gas in 15 minutes, and the other will give off so much gas in 15 minutes?

A. Yes sir, it establishes one thing, that one will give off so much gas, and another will give off so much gas, but it doesn't establish the fact if one gives off so much gas for one minute that it is going to give off so much gas relatively in proportion in the second or third or fourth minute.

Q. How long will a can or vessel containing ordinary coal oil continue to give off gas?

223 A. Oh, I don't know.

Q. Will it be a day or a week?

A. I don't know at all.

Q. How much will it give off the first minute under those conditions?

A. I don't know sir.

Q. What proportion?

A. I don't know, it all depends on the volatility of the material that it is giving off; you understand Mr. Shartel that gasoline as you said the other day, and you told the truth in that case, that gasoline will boil at zero, probably, and on up, a vapor comes off from zero, and on up; the material in there sometimes has a boiling point or minus zero, and it is held there mechanically by the other liquid or less volatile liquid, so it all depends on the volatility of the gasoline present how rapidly it is going to be given off; if it is a highly volatile liquid, it is going to give it off more rapidly the first minute than another one, containing the same proportion by weight, of

gasoline, or a less volatile gasoline, while the kerosene that is practically without gasoline aside from the very small percentage, is going to be nearly uniform in its volatility throughout an indefinite length of time.

Q. Professor, you take a quarter of a pint of gasoline that gives off 3.5 parts in a thousand in the shape of vapor, in five minutes, ten minutes, and that is all imprisoned, held in a body, how much of an explosion can you get out of it.

A. The question again, please.

Q. Take 3.5 parts in a thousand, say half a pint of gasoline and volatize it, how much of an explosion could you get out of that much gas?

224 A. It all depends on the amount of air you have mixed with it.

Q. Or suppose you have the air mixed with it, just right for a blow-up, how much of a blow-up are you going to get out of it?

A. If we take a pint, for round numbers——

Q. Let's take half a pint.

A. Well, then, we will divide it by two after we have worked out our pint; according to those figures, and according to the testimony which I gave which has not been contradicted——

Q. Well, that may not spell anything, but go on.

A. Your expert didn't file any objections to it—a given volume of kerosene or gasoline in vaporizing will give from 1500 to 1800 volumes of vapor. Now the figures that Mr. Chauvenet gave of 3.5 parts per thousand, of 35 in one thousand——

Q. 35 in ten thousand?

A. 3.5 parts in one thousand.

Q. Or 35 in ten thousand.

A. I would rather use it,—you may have it your way, it is the same ratio, nevertheless. Now you just have the same percentage and you may figure that out.

Q. I want to see that we understand each other about this, that would be 35/10,000 of a pint, take a pint of oil?

A. Yes sir.

Q. And it makes 1800 times that?

A. Anywhere from 1500 to 1800 depending on how high or how low kerosene it is.

Q. Multiply 35/10,000 by 1800, that would give the amount in cubic pints of gas?

A. Exactly, so, yes sir.

Q. See if I have figured that right, see if the result would be 6.3 pints?

A. Yes sir, I think that is correct.

225 Q. That would be the volume of atmosphere displaced by the gas?

A. That is evaporating its ratio from the surface of a dish two and a half inches in diameter.

Q. Just answer my question?

A. Yes sir, that would be the volume.

Q. How much of an explosion could you get out of that?

A. Wouldn't get much of an explosion out of that.

Q. It would have to evaporate a good deal faster than that to produce a very dangerous explosion, wouldn't it?

A. Yes sir.

Q. And the amount of gas that the two would make in 15 minutes, the difference between 3.5 and 3.26 would be so slight that you couldn't tell the difference in the explosions?

A. What do you mean by the two would make?

Q. Well, the one that evaporates 3.26 in 15 minutes, would give just about its size, without that fraction 3/10th, would it not?

A. Each one of them I say contains gasoline.

Q. No, these two mixtures he speaks of, coal oil and coal oil mixed with gasoline.

A. As I understand his direct testimony each one contained gasoline.

Q. No, his testimony was that one was coal oil and one was coal oil and gasoline mixed, now then one of them giving off 3.26 parts in a thousand, and the other 3.5 in a thousand, how much difference would there be in the resultant explosion of the gas resulting from those two mixtures they confound?

A. Mr. Shartel, he said——

Q. I am not asking you what he said, I am asking you for the result in the explosions on that hypothesis.

226 A. Well, assume what he said is true——

Q. Yes.

A. Why, one volume is almost the same as another volume, and the explosions would be nearly in the same ratio, yes sir.

Q. Now, are you able to state to this jury that the exposure of these two liquids to a wider surface on that kindling, would destroy that ratio of evaporation?

A. I certainly am.

Q. You say that to this jury, do you?

A. I say that unqualifiedly, it makes the greatest difference imaginable?

Q. How much difference does it make?

A. I don't know, I didn't arrive at any figures, I will have to explain it to you if you want to know.

Q. I don't want any explanation, I asked you if you know from your own personal knowledge what that would be?

A. I couldn't say one is 1726 times more than the other, but I can give you something that will indicate it.

Q. I am not asking you for any indications, I asked you for your knowledge?

A. I am not up here to make guesses.

Q. You don't know what the difference in volatility would be between the two if exposed in that fashion?

A. I can't tell you the difference in figures, but I can tell you what causes the difference, but I can't give you the determinate causes.

Q. I am asking you for the ratio, if you know what it is.

By the COURT: He has said he couldn't give it, there is no use to argue the question.

By Mr. HUSTON: Just state the approximate difference of the difference in surface and the reason.

227 Objected to as incompetent, and to the competency of the witness.

By the COURT: I think you are consuming a great deal of time on an immaterial matter.

By Mr. SHARTEL: Then I will object as to its materiality.

Which objection was by the Court sustained.

The Plaintiff Here Rests.

The Defendant Here Rests.

Evidence Closed.

TERRITORY OF OKLAHOMA, *Logan County, ss:*

I, Thomas A. Higgins, do hereby certify that the above and foregoing is a true, full and complete transcript of all the evidence given and introduced on the trial of the above cause.

Witness my hand this 17th day of August, 1905.

THOS. A. HIGGINS,
Court Reporter.

228 Thereafter and on the same day the Court instructed the jury in writing as to the law of said case, as follows, to wit:

In the District Court of Logan County, Oklahoma Territory.

ALBERT B. DESELMS, Plaintiff,
vs.
THE WATERS PIERCE OIL CO., Defendant.

Instructions.

1. The plaintiff brings this action to recover damages for the death of his two children, which it is alleged was caused by the wrongful act of the defendant. The material averments on the plaintiff's petition are, that he is the father and next of kin of Fred S. Deselms and of Genore Deselms; that they were both minors, unmarried at the time of their death in January, 1903, and that no administrator has been appointed for the estate of either of said children.

That the defendant is a corporation organized and existing under the laws of the state if Missouri, and was at the time of the alleged transaction engaged in the business of handling and selling at wholesale coal oil and gasoline in Oklahoma, and had and maintained an agency at the City of Guthrie, where they maintained separate storage tanks for coal oil and gasoline. That in January, 1903, the defendant carelessly and negligently mixed a large quantity of gaso-

line with a large quantity of coal oil and after the same had been so mixed and commingled, the said defendant through its agents and employés, with knowledge of said mixture and that it was highly inflammable, liable to explosion and dangerous to be used as coal oil, knowingly, wilfully, wrongfully, wantonly and negligently sold and delivered three barrels of said mixture as p. w. coal oil, to the firm of Powers & Deselms, merchants at Orlando, Oklahoma. That
229 said Powers & Deselms, their clerks or employés had no knowledge or notice of the character of such mixture.

That thereafter in January, 1903, the plaintiff purchased one gallon of said mixture from said mercantile firm of Powers and Deselms, and carried the same to his home in Orlando in an ordinary coal oil can in which said mixture was kept at his home.

That on or about February 4, 1903, said mixture of coal oil and gasoline which plaintiff had purchased and conveyed to his house, by reason of its dangerous and explosive character, and by reason of the wrongful and negligent acts of the defendant, exploded and set fire to plaintiff's house and caused the death of his son, Fred S. Deselms, and his daughter, Genore Deselms, and burned and mutilated their bodies, and that he has been damaged thereby, for which he claims damage in the sum of ten thousand dollars for the loss of each child.

2. To the averments of the petition the defendant has entered a denial in general and also alleges that if any such accident occurred, that the same was occasioned by the negligence of the plaintiff or the mother of the children and that no recovery can be had.

3. The burden is on the plaintiff to prove all the material averments in his petition by a preponderance of the evidence before he is entitled to recover. By a preponderance of the evidence is meant the greater weight of the evidence and does not necessarily mean the greater number of witnesses.

230 4. By the laws of this Territory, dealers in illuminating oils and gasolines are prohibited from selling any such oils or gasoline until the same shall have been inspected by the Territorial Coal oil Inspector and have been pronounced of a quality permitted to be sold, and any person violating such law is made liable for a penalty, in a criminal prosecution. All illuminating oils or fluids that flash at a less temperature than 120 degrees Fahrenheit, and have not a specific gravity of not less than 46 degrees Baume, that is, all oils that fail to stand both tests, are required to be "rejected," and all gasoline used in vapor stoves and gasoline lamps shall have a specific gravity of not less than 70 degrees Baume at a temperature of 60 degrees Fahrenheit. Oils and gasolines which do not come up to the tests prescribed by our laws are not permitted to be sold for domestic purposes.

5. If you find from a preponderance of the evidence that the defendant, Waters Pierce Oil Company, knowingly sold a mixture of coal oil and gasoline to Powers and Deselms, to be by them resold as coal oil, in the usual and ordinary manner as retail merchants, and that said mixture was of a highly inflammable, explosive and dangerous character when used with reasonable and ordinary caution, for

the usual and ordinary purposes for which coal oil is usually and generally used, and that the plaintiff procured a portion of said mixture from Powers and Deselms to be used for coal oil and carried the same to his home in a coal oil can, and that while handling the same with ordinary care and caution, in such manner as an ordinarily prudent person ordinarily uses or handles the same and for the purposes for which coal oil is usually, generally and ordinarily used, and that while so handling the same, said mixture ex-
231 ploded or caused an explosion which killed and burned the plaintiff's children, you will then return your verdict in favor of the plaintiff and assess his damages at such sum as you shall determine to be reasonably commensurate.

6. One of the material questions for you to determine is, whether or not the fluid sold in this instance was reasonably safe for the purposes for which it was sold, or whether it was dangerous to be used as coal oil. If the defendant sold an uninspected or rejected fluid which was more dangerous than the quality prescribed by law, and the plaintiff or his wife had no knowledge or notice of its dangerous quality, and while using it with ordinary care and caution such as ordinarily prudent persons would exercise under similar circumstances and for the uses and purposes for which coal oil is usually and generally intended and used, such fluid exploded or took fire and caused the death of plaintiff's children, then the defendant is liable in damages.

7. Another important and material question for your determination is whether or not the use of the fluid sold in any manner caused the accident complained of, and if it caused it, the manner of causing it. You cannot base your determination upon mere supposition or conjecture, but you are permitted to find such facts proven as are the rational and reasonable inferences from other facts proven. If you find that the wife of the plaintiff was at the time of the accident using the oil to kindle or aid in starting a fire in the stove, you will then determine whether the making use of coal oil to kindle or start fires is a usage or custom so general and universal as to be a part of the general knowledge and experience of persons of average intelligence and experience, and if the defendant at the time it
232 sold said oil had reason to believe that it would be used for such purposes. If it is not the general and usual custom to use coal oil for kindling fires, and the defendant when it sold the fluid to Powers & Deselms to be resold, had no reason to believe it would be sold for such purposes, and the use of it for such purposes was the cause of the accident, then the plaintiff is not entitled to recover.

8. The plaintiff is not entitled to recover in this case if he or his wife was guilty of any carelessness or negligence which in any degree contributed to the accident from which death resulted. If you find that the wife of the plaintiff was handling the coal oil can for any purpose at the time of the accident, and that she did not in handling or making use of the oil, exercise such care and caution as an ordinarily prudent person would exercise under similar circumstances, then she was guilty of negligence which contributed to the injury, and the plaintiff cannot recover in this action.

9. If you find for the plaintiff you will fix the amount of his damages at such sum as will reasonably compensate him for his pecuniary loss occasioned by the death of the two children.

Damages are intended to be compensatory and must be fair, reasonable and just. The father is entitled to the services of his son until he arrives at the age of twenty-one years, and of the daughter until she arrives at the age of eighteen; he is also charged with the expense of their support, maintenance education and social training, and you must fix the amount which in your judgment will compensate him for any pecuniary loss he may have sustained.

233 You are the judges of the facts, the weight of the evidence and the credibility of the witnesses, but you are bound by the law as given you by the court. In determining the weight of credit you will give to the testimony of any witness, you may take into consideration the interest of the witness in the result of this action; his relation to the parties, whether friendly or unfriendly; his bias or prejudice, if any should be manifest; his conduct and demeanor on the witness stand and in the presence of the jury; his fairness and impartiality or lack of the same; his means of observation and opportunities of knowing the matters about which he has testified, and you may give to the testimony of any witness such weight and credit as you may deem it entitled to under all the facts and circumstances appearing in evidence or coming to your observation during the trial.

If you should find that any witness has wilfully testified falsely to any material matter, you are then at liberty to disregard the whole of the testimony of such witness, except in so far as the same may be corroborated by other credible evidence.

Your verdict in this case must be based upon the evidence which the court has permitted to go to you, and the law as given you in these instructions, aided by such general knowledge and experience as you possess in common with all persons of average intelligence.

Instructions Requested by Defendant.

Given.

9. You are further instructed that if you believe from the evidence that the deceased, Rosalie Deselms, was guilty of negligence which contributed directly and approximately to the happening of the accident, then the plaintiff cannot recover in this case.

234 Given.

10. You are not at liberty to indulge in conjecture or guesses for the purpose of finding a verdict against the defendant in this case even though you should find that the mixture of oil and gasoline was a dangerous substance and that defendant was guilty of negligence in placing the same upon the market, but before you can find the defendant liable for the injury you must also be able to say on your oath, from the preponderance of the evidence, not that the accident in question might have happened from that cause,

or that the mixture in question might produce that result, but that it did, in fact, cause the accident and produce that result, and that the accident would not have happened except for the mixture.

Given.

6. Before you can find for the plaintiff in this action and against the defendant you must be satisfied by a preponderance of the evidence in the case that the fact of the mixture of oil and gasoline was the cause of the death of the plaintiff's children and that but for such mixture of oil and gasoline the accident would not have happened, and, unless you are so satisfied by the preponderance of the evidence that the accident was caused in this manner and free from the intervention of other causes sufficient to cause the accident regardless of the presence of the mixture of gasoline in the oil, it will be your duty to find for the defendant.

Given.

7. You are instructed, as a matter of law, that the pouring of kerosene from an ordinary oil can into a stove containing coals, live embers of fire is an act of negligence and if you believe from the evidence that the death of the children of the plaintiff re-
235 sulted from an attempt on the part of their mother to kindle a fire in that manner the plaintiff cannot recover in this case.

Given.

8. If you believe from the evidence that the accident was produced as the result of an attempt on the part of Rosalie Deselms, the mother of the deceased children, to kindle a fire in the stove by pouring the oil, or mixture of oil and gasoline, into the same from an ordinary oil can while the stove contained fire, live coals or live embers it will be your duty to find your verdict for the defendant.

Given.

14. In determining the amount of your verdict for the plaintiff, if you find for such plaintiff, you should not take into consideration the pain suffered by the deceased or the wounded feelings of the father or other surviving relatives, but your verdict must be limited to such amount, if any, as you believe the plaintiff has suffered financially by reason of the death of his children. In other words, the recovery, if any, is to be a pecuniary compensation for a pecuniary loss, and such finding of loss must be based upon the evidence introduced in the case. The amount of damages cannot be fixed by the evidence, but must be the result of your own judgments.

Which instructions are endorsed: No. 4068. Albert B. Deselms, *vs.* Waters Pierce Oil Co. Instructions Given. Filed Mar. 6, 1905, Thos. A. Neal Clerk District Court.

236 By Mr. SHARTEL: The defendant, before the jury retire, and in the presence and hearing of the jury, except to in-

struction numbered four, given by the Court, and to each and every part of the same.

The defendant, before the jury retire, and in the presence and hearing of the jury, excepts to instruction number five, given by the court and to each and every part of the same.

The defendant, before the jury retire, and in the presence and hearing of the jury, excepts to instruction number six, and to each and every part of the same.

The defendant, before the jury retire, and in the presence and hearing of the jury, excepts to instruction number seven, given by the court, and to each and every part of the same.

The defendant, before the jury retire, and in the presence and hearing of the jury, excepts to instruction number eight, given by the court, and to each and every part of the same.

The defendant, before the jury retire, and in the presence and hearing of the jury, excepts to instruction number nine, given by the court, and to each and every part of the same.

And also at the same time, the defendant requested the court to give to the jury the following instructions, which request was by the Court overruled and refused, as follows, to wit:

237 In the District Court of Logan County, Oklahoma.

ALBERT DESELMS, Plaintiff,
vs.
WATERS PIERCE OIL CO., Defendant.

Instructions Asked by Defendant.

In this case the defendant asks the court to instruct the jury in writing and to give to them the following instructions:

Refused.

1. In this case you are instructed that the plaintiff cannot recover and your verdict should be for the defendant.

If the court refuses to give the foregoing instruction, then the defendant requests that each of the following instructions be given to the jury.

Refused.

2. In this case the defendant owed no duty to the plaintiff or to the deceased arising out of any contract of sale, and, if the plaintiff is entitled to recover, it must be because the mixture of kerosene and gasoline claimed to have been sold by the defendant was an instrument in its nature calculated to do injury and essentially and in its elements an instrument ordinarily dangerous to life or property.

Refused.

3. Petroleum oil is dangerous only when *in* considerable quantities of it is brought in contact with fire, and is not a dangerous

agency within the rule that he who sells it does so at his peril and must respond for the injuries thereby occasioned to third persons with whom there is no contractual relation.

Refused.

238 4. If you believe from the evidence that the mixture claimed to have been sold by defendant was in and of itself a dangerous agency and liable to explosion only when brought into contact with fire, then the plaintiff cannot recover in this case.

Refused.

5. If you believe from the evidence in this case that the defendant sold to the firm of retail dealers three barrels of a mixture of oil and gasoline and shipped the same to such firm of retail dealers in packages which were not branded by the public inspector of oils, or any of his deputies, as approved standard oil, and such oil was a mixture unsafe and dangerous in its character and that an inspection of such oil by the public inspector previous to its being sold at retail by the said firm of retailers would have disclosed its dangerous character and resulted in the same being branded rejected, you are then instructed that said firm of retailers would be guilty of a criminal violation of the law in selling such oil for illuminating purposes, and, if you believe from the evidence but for such failure to inspect such oil or have the same inspected by the said firm of retail dealers the accident in controversy in this case would not have happened, it will by your duty to find in favor of the defendant in this case.

Refused.

11. Even though you find the mixture of oil and gasoline in controversy in this case to have been a dangerous substance and to have been negligently put on the market by the defendant unless the plaintiff has satisfied you by a preponderance of the evidence that the defendant sold and marketed the oil with the expectation that it would be retailed and used for other than illuminating pur-
239 poses, and that the defendant intended in placing it on the market that it should be so used and the accident resulted from making a different or other use of the oil and by using the same for fuel or kindling fires in stoves, it will be your duty to find for the defendant in the case.

Refused.

12. If you find in favor of the plaintiff and against the defendant you have no right to merely mulct the defendant in damages for negligence nor to make the death of the children a pecuniary speculation to the father, but your verdict must be limited to such an amount as will make good to the plaintiff the actual loss sustained by him by such deaths.

Refused.

13. In determining the amount of loss, if any, sustained by the plaintiff you should consider whether the plaintiff was legally, or, in fact, dependent upon the deceased for his support or whether the plaintiff would probably have received a financial benefit from the continuance of the lives of his children.

Refused.

Which instructions are endorsed: No. 4068. Albert B. Deselms *vs.* Waters Pierce Oil Company. Instructions refused. Filed Mar. 6 1905 Thos. A. Neal, Clerk District Court.

240 By Mr. SHARTEL: The defendant, before the jury retire, and in the presence and hearing of the jury, excepts to the refusal of the court to give instruction number one, asked by the defendant.

The defendant, before the jury retire, and in the presence and hearing of the jury, excepts to the refusal of the court to give instruction number two, asked by the defendant.

The defendant, before the jury retire, and in the presence and hearing of the jury, excepts to the refusal of the court to give instruction number three, asked by the defendant.

The defendant, before the jury retire, and in the presence and hearing of the jury, excepts to the refusal of the court to give instruction number four, asked by the defendant.

The defendant, before the jury retire, and in the presence and hearing of the jury, excepts to the refusal of the court to give instruction number five, asked by the defendant.

The defendant, before the jury retire, and in the presence and hearing of the jury, excepts to the refusal of the court to give instruction number eleven, asked by the defendant.

The defendant, before the jury retire, and in the presence and hearing of the jury, excepts to the refusal of the court to give instruction number twelve, asked by the defendant.

The defendant, before the jury retire, and in the presence and hearing of the jury, excepts to the refusal of the court to give instruction number thirteen, asked by the defendant.

The defendant also excepts to the modification of instruction number fourteen, requested by the defendant, by adding the words thereto, "The amount of damages cannot be fixed by the evidence, but must be the result of your own judgments."

241 Thereafter and on the same day, to wit; March 6, 1905, said jury retired to consider of its verdict, under the charge of a sworn bailiff. And said jury after deliberating, returned into open court, in charge of its bailiff, and returned the following verdict, to wit:

In the District Court of Logan County, Oklahoma Territory.

ALBERT B. DESELMS, Plaintiff,
vs.
WATERS-PIERCE OIL COMPANY, Defendant.

Verdict.

We, the jury in the above entitled cause, do upon our oaths, find the issues in favor of the plaintiff, and fix the amount of his recovery at the sum of Fourteen thousand five hundred $14,500 Dollars.

C. E. HERWIG, *Foreman.*

Endorsed: 4068. Deselms *v.* Waters Pierce Oil Company. Verdict. Filed Mc'h 6, 1905, T. A. Neal Clerk by Wm. R. Benham, Deputy.

242 And thereafter and on the same day, the defendant filed in the office of the clerk of said court, its motion for a new trial therein, which said motion for new trial, together with the endorsements thereon, is in the words and figures following, to wit:

In the District Court of the County of Logan and Territory of Oklahoma.

4068.

ALBERT B. DESELMS, Pl'ff,
vs.
THE WATERS PIERCE OIL CO., Def't.

Motion for a New Trial.

Comes now the defendant above named and moves the court to set aside the verdict of the jury in this cause and grant the defendant a new trial for the following reasons, to wit:

First. Excessive damages appearing to have been given under the influence of passion or prejudice.

Second. Error in the assessment of the amount of recovery the same being too large.

Third. That the verdict is not sustained by sufficient evidence.

Fourth. That the verdict is contrary to law.

Fifth. Error of law occurring at the trial and duly excepted to at the time by this defendant.

SHARTEL, KEATON & WELLS,
Att'ys for Defendant.

Endorsed: 4068. Deselms *vs.* Waters Pierce Oil Company. Filed M'ch 6, 1905. T. A. Neal, Clerk, By Wm. R. Benham, deputy.

243 Thereafter, and on the 8th day of April, 1905, there was filed in the office of the clerk of the district court, the following journal entry of judgment, to wit:

In the District Court of Logan County, Oklahoma Territory.

No. 4068.

ALBERT B. DESELMS, Plaintiff,
vs.
WATERS PIERCE OIL COMPANY, Defendant.

Journal Entry.

And now upon this 3rd day of March, 1905, the same being one of the regular judicial days of the February term, 1905, of said court, this cause comes on to be heard before the court and a jury. The plaintiff appearing in person and by his attorneys John Devereux and Lawrence & Huston, and the defendant appearing by its attorneys, Shartel, Keaton & Wells.

And thereupon the plaintiff by his attorneys made a statement to the jury, and the defendant by its attorneys waived its statement, and thereupon the plaintiff offered his testimony and rested.

And now on this 4th day of March, 1905, the further trial of said cause was resumed, and the defendant offered its testimony and rested. And thereupon the court adjourned until Monday, the 6th day of March, 1905.

And now upon this 6th day of March, 1905, the further trial of said cause was resumed, and the plaintiff offered his testimony in rebuttal and rested. And thereupon the court instructed the jury in writing, and thereupon the counsel for the plaintiff made the opening argument for the plaintiff to the jury, and thereupon
244 counsel for defendant waived the making of any argument and the case was closed, and the jury retired to their jury room in the charge of a sworn bailiff to consider of their verdict.

Thereafter and on the same day the jury returned in open court in charge of their bailiff and announced that they had agreed upon a verdict, and returned the same in open court, which said verdict is in words and figures following:

"We, the jury in the above entitled cause, do upon our oaths, find the issues in favor of the plaintiff, and fix the amount of his recovery at the sum of Fourteen Thousand Five Hundred $14,500 Dollars.

C. E. HERWIG, *Foreman.*"

And thereupon the court ordered this verdict to be recorded.

And thereafter on the same day the said defendant filed his motion for a new trial.

And thereafter on the 6th day of April, 1905, the same being one of the regular judicial days of the February Term of said court, the court overruled said motion for a new trial, to which the defendant excepted. And thereupon the court proceeds to render judgment

upon said verdict, and it is now considered, ordered and adjudged by the court that the plaintiff, Albert B. Deselms, have and recover of and from the defendant the Waters Pierce Oil Company the sum of Fourteen Thousand Five Hundred ($14,500) Dollars, with interest thereon at the rate of seven per cent. until paid, together with the costs of this action taxed at the sum of $—, for which let execution issue.

To which judgment the defendant excepts and is given ninety days from this date to make and serve a case on appeal, and the plaintiff is given ten days to suggest amendments to said case, and which is to be settled on five days' notice.

JNO. H. BURFORD, *Judge.*

245 Endorsed: No. 4068. Albert B. Deselms, Plaintiff *vs.* Waters Pierce Oil Company, Defendant. Journal Entry. Filed Apr. 8, 1905, Thos. A. Neal, Clerk District Court. Filed Nov. 2, 1905, Benj. F. Hegler, Clerk Supreme Court, by Jessie Pardoe, Deputy.

Thereafter and on the 3rd day of July, 1905, there was filed in the office of the clerk of the district court of said county, an order extending time to make and serve case made, which order, together with the endorsements thereon, is in the words and figures following, to wit:

246 In the District Court of Logan County, Oklahoma.

No. 4068.

ALBERT B. DESELMS, Plaintiff,
vs.
WATERS PIERCE OIL COMPANY, Defendant.

Order Extending Time for Case-made.

Now on this 3rd day of July, 1905, it being shown to the court that the time heretofore allowed defendant to make and serve a case made for the Supreme Court, in the above entitled cause, will soon expire, and that owing to rush of other work the stenographer of this court has been unable to prepare and transcribe the testimony taken at the trial of said cause; it is therefore ordered that the time for making and serving such case made be and the same is hereby extended for thirty days after the expiration of the time heretofore allowed.

JNO. H. BURFORD,
District Judge.

Endorsed: No. 4068. Albert B. Deselms, *vs.* Waters Pierce Oil Company. Order extending time for case made. Filed Jul- 3 1905, J. H. Norris Clerk District Court. Filed Nov. 2, 1905, Benj. F. Hegler, Clerk Supreme Court, by Jessie Pardoe, Deputy.

247 Thereafter and on the 28th day of July, 1905, there was filed a further order extending time to make and serve a case-made in said cause, which order, together with the endorsements thereon, is in the words and figures following, to wit:

In the District Court of Logan County, Oklahoma.

No. 4068.

ALBERT B. DESELMS, Plaintiff,
vs.
WATERS PIERCE OIL COMPANY, Defendant.

Order Extending Time for Case-made.

Now on this 24 day of July, 1905, it being shown to the court that the time heretofore allowed defendant to make and serve a case made for the supreme court, in the above entitled cause, will soon expire, and that owing to rush of other work the stenographer of this court has been unable to prepare and transcribe the testimony taken at the trial of said cause; it is therefore ordered that the time for making and serving such case made be and the same is hereby extended for thirty days after the expiration of the time heretofore allowed.

JNO. H. BURFORD,
District Judge.

Endorsed: No. 4068. In the District Court of Logan County, Okla. Albert B. Deselms, Plaintiff, *vs.* Waters Pierce Oil Company, Defendant. Order extending time for case made. Filed Jul- 28, 1905, J. H. Norris, Clerk District Court. Shartel, Keaton & Wells, Oklahoma City, Okla. Attorneys for Defendant. Filed Nov. 2, 1905, Benj. F. Hegler, Clerk Supreme Court by Jessie Pardoe, Deputy.

248 TERRITORY OF OKLAHOMA, *Logan County, ss:*

The above and foregoing case made contains and is a true full and complete copy, transcript and record of all the pleadings, motions, orders, evidence, objections, rulings, exceptions, proceedings and judgments filed, had and rendered in said cause.

Dated this — day of August, 1905.

SHARTEL, KEATON & WELLS,
Attorneys for Defendant.

Filed Nov. 2, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court.
By JESSIE PARDOE, *Deputy.*

249 TERRITORY OF OKLAHOMA, *Logan County, ss:*

We, the undersigned, attorneys for the plaintiff in the above cause, do hereby accept service of the above and foregoing case made upon us, this 2nd day of September, 1905.

LAWRENCE & HUSTON AND
STRANG & DEVEREUX.

Filed Nov. 2, 1905,
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

And we hereby waive the suggestion of any amendments to said case made, and consent that the same may be settled and signed at any time or place, without further notice to us or either of us of the time and place of such settlement and signing.

Dated this 5th day of October, 1905.

STRANG & DEVEREUX AND
LAWRENCE & HUSTON,
Attorneys for Plaintiff.

Filed Nov. 2, 1905,
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

250 TERRITORY OF OKLAHOMA, *Logan County, ss:*

I, Jno. H. Burford, Judge of the district court of Logan County, Oklahoma Territory, and the judge who tried the above cause, do hereby certify that the above and foregoing case made has been duly presented to me in due time by the parties thereto as required by law, and that the suggestion of any amendment thereto has been duly waived, and consent given by the plaintiff that the same may be settled and signed at any time or place, without notice to him; I further certify that said case-made as presented to me, contains and is a true, full and correct copy, transcript and record of all pleadings, motions, orders, evidence, objections, rulings exceptions, proceedings and judgments, filed, had, heard, and rendered therein, and I hereby allow, settle, certify and sign the same as true and correct, and order the clerk of the district court of Logan County, Oklahoma, to attest the same with the name and seal of said court and file the same of record as provided by law.

Witness my hand at my chambers in Chandler, this 7th day of October, 1905.

JNO. H. BURFORD,
Judge of the District Court
of Logan County, Oklahoma.

Attest: [SEAL.] J. H. NORRIS, *Clerk.*

Filed Nov. 2, 1905,
J. H. NORRIS,
Clerk District Court.

Filed Nov. 2, 1905,
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

251 Case-made endorsed: No. 1819, Waters Pierce Oil Co. *vs.* Albert B. Deselms, Petition in error and case made. Filed Nov. 2, 1905, Benj. F. Hegler, Clerk Supreme Court.

252 And thereafter, on the fourth day of January, 1906, a Motion to Dismiss was filed in said cause, which motion reads in words and figures as follows, to wit:

253 In the Supreme Court of the Territory of Oklahoma.

No. 1819.

WATERS PIERCE OIL COMPANY, Plaintiff in Error,
vs.
ALBERT B. DESELMS, Defendant in Error.

Motion to Dismiss.

Comes now the defendant in error and moves the court to dismiss this writ of error and case made for the reasons and upon the grounds following:

1. For that the plaintiff in error has failed to number the pages of its petition in error as required by Rule Three of the Rules of Practice of this Court.

2. For that the record is very voluminous comprising over two hundred and sixty pages, and the plaintiff in error has failed to index the same, nor is there any index or other means provided, by which the court can ascertain on what page of the record, or in what part of the record any of the testimony or other material matters can be found, and the court is left without index or guide to find any portion of the record they may desire to examine, without convenience or any means to point out such portion of the record.

LAWRENCE & HUSTON AND
DEVEREUX & HILDRETH,
Attorneys for Defendant in Error.

We hereby accept service and acknowledge the receipt of a copy of the above and foregoing motion to dismiss this 4th day of January, 1906.

SHARTEL, KEATON & WELLS,
Attorneys for Plaintiff in Error.

Endorsed: No. 1819.—In the Supreme Court of the Territory of Oklahoma—Waters Pierce Oil Company, Plaintiff in error, *vs.* Albert B. Deselms, Defendant in error—Motion to Dismiss—Lawrence & Huston and Devereux & Hildreth, attorneys for defendant in error—Filed Jan. 4, 1906, Benj. F. Hegler, Clerk Supreme Court.

254 And thereafter, at the January, 1906, Term of said Supreme Court, on the Sixth day of January, 1906, the following proceeding was had in said cause, to wit:

1819.

WATERS PIERCE OIL COMPANY, Plaintiff in Error,
vs.
ALBERT B. DESELMS, Defendant in Error.

Ordered by the Court, that the motion to dismiss herein be and the same is hereby overruled; and that plaintiff in error be required to number pages of record.

255 And thereafter at the January, 1906, Term of said Supreme Court, on the Ninth day of January, 1906, the following proceeding was had in said cause, to wit:

1819.

WATERS PIERCE OIL COMPANY, Plaintiff in Error,
vs.
ALBERT B. DESELMS, Defendant in Error.

Come now John W. Shartel, of counsel for plaintiff in error, and A. H. Huston, of counsel for defendant in error, and make oral argument herein. And cause is taken on record, oral argument and briefs, with ten days to plaintiff in error for reply brief.

256 And thereafter, at the January, 1907, Term of said Supreme Court, on the Thirteenth day of February, 1907, the following proceeding was had in said cause, to wit:

#1819.

WATERS PIERCE OIL COMPANY, Plaintiff in Error,
vs.
ALBERT B. DESELMS, Defendant in Error.

And now this cause comes on for final decision and determination by the Court upon the oral argument, record and briefs submitted herein.

And the Court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court herein should be affirmed, at the cost of plaintiff in error.

It is therefore ordered and adjudged by the Court, that the judgment of the lower court in this cause be and the same is hereby affirmed, at the cost of plaintiff in error.

Opinion by Gillette, J. All the Justices concurring except Bur-

ford, C. J., who tried the case in the court below, not sitting, and Burwell, J., who concurs in the judgment but not in all of the reasons given for the same.

Which opinion reads in words and figures as follows, to wit:

257 In the Supreme Court of the Territory of Oklahoma, January Term, 1907.

Filed February 13, 1907.

No. 1819.

THE WATERS-PIERCE OIL CO., Plaintiff in Error,
vs.
ALBERT B. DESELMS, Defendant in Error.

Syllabus.

1. Police Power of State.—Where the statute, as in this Territory, prohibits the sale of petroleum products except the same be of a specified degree of purity, *Held*, that the passage and enforcement of such statute is within the police power of the Territory and may be strictly enforced.
2. Negligence.—Where a corporation engaged in the wholesale distrietution of coal oil, after an inspection of a tank of oil as required by the laws of the Territory, by accident mingles and mixes gasoline with the same, and sells the same to the general trade as pure and standard grade oil, without reinspection and without notice, *Held*, that such sale is an act of negligence for which it would be liable in damages resulting from such negligent act to a person purchasing the same as pure oil from the vendee of the corporation so selling and disposing of the same.
3. Circumstantial Evidence—Inference Therefrom.—Where an accident has occurred resulting in the death of all the persons immediately connected therewith and there is no direct proof as to how the accident occurred, the manner of its occurrance may be shown by circumstantial evidence from which the jury may infer the manner and cause of the accident if the inference is reasonable although not a necessary resulting fact.
4. Common Knowledge—Jury May Act Upon.—Where, on the trial of a case, a probative fact is the subject of consideration and the existence of such fact is a matter of general knowledge, it is not reversible error for the trial court to direct the jury to determine the existence of such fact, without proof—if a usage or custom in performing the act sought to be established, is so general and universal as to be a part of the general knowledge and experience of persons of average intelligence and experience, for the reason that jurors may act

upon matters of common observation within their general knowledge without any testimony on those matters.

5. Damages—When not Excessive.—Where the verdict of a jury for damages resulting from the death of an individual is within
258 the statutory limitations in such cases and there is no special evidence shown by the record from which the court may determine that the damages awarded are excessive or given under the influence of passions or prejudice, this court may not interpose its judgment for that of the jury in determining the amount of the award.

Error from the District Court of Logan County.

Jno. H. Burford, Trial Judge.

Affirmed.

Shartel, Keaton & Wells, for plaintiff in error.
Lawrence & Huston, Devereux & Hildreth, for defendant in error.

Statement of Facts.

This action was commenced in the District Court of Logan County by the defendant in error, Albert B. Deselms, against the plaintiff in error, the Waters-Pierce Oil Company, to recover damages for the death of his wife and two children, occasioned as alleged by the wrongful and gross negligence of the plaintiff in error.

The petition alleges that The Waters-Pierce Oil Company, at and previous to the 28th day of January, 1903, was engaged in the business of a jobber or wholesaler of coal oil and gasoline in the Territory of Oklahoma, and in the conduct of that business to have had a tank station at the City of Guthrie, where it kept oil and gasoline in storage in large quantities for shipment to retail dealers; and that at some time previous to the said 28th day of January, 1903, the defendant mixed and mingled a large quantity of gasoline with a large quantity of coal oil, and that on the same day when this was done the agents and employés of defendant discovered and were fully informed of the fact that said fluids had been mixed and
259 mingled in one of the tanks of said defendant located at its agency at said City of Guthrie; and further alleges that this mixture of coal oil and gasoline was highly inflammable, liable to explode and particularly dangerous to be used as coal oil, which the defendant well knew. That the defendant, knowing and being fully informed that the said coal oil and gasoline had been mixed and mingled, and that the same constituted a dangerous and explosive mixture, knowingly vended and sold as P. W. coal oil three barrels of said mixture to the firm of Powers & Deselms, retail merchants at Orlando, Oklahoma, and that the plaintiff purchased from said firm of Powers & Deselms, one gallon of said mixture and took it to his home in an ordinary 2 gallon oil can, and that neither the plaintiff nor either member of said firm or any clerk or employee

of said firm had any notice or knowledge that said coal oil and gasoline had been mixed and mingled together, or of the dangerous character of said mixture, and that by reason of the dangerous and explosive character of said mixture, on the 4th day of February, 1903, it exploded setting on fire the residence of plaintiff and causing the death of plaintiff's wife and two children.

The defendant in due time filed its answer which was a general denial and an allegation that, if the accident complained of occurred, it was caused by the negligence of plaintiff's wife Rosalie Deselms, directly contributing thereto. To this answer plaintiff replied by a general denial. On the 28th day of February, 1905, plaintiff, by leave of the court first granted, dismissed his first cause of action (being the claim for the death of his wife, Rosalie Deselms) and the cause came for trial on the 3rd day of March, 1905, before the court and jury.

On the trial of the cause defendant admitted that on the 19th day of January, 1903, there was an accidental mixture in a tank of oil containing 6666 gallons of coal oil, in which there was mixed by mistake 305 gallons of gasoline, and that the defendant was
260 at once apprised of the mixture and upon full consideration of the fact, directed its agents in charge of the tank to sell the contents of the tank as ordinary illuminating coal oil, with full knowledge of all the facts. The defendant's manager at Guthrie, N. M. Carter, testified to the same fact, and there was also introduced in evidence a letter, dated January 20, 1903, from the defendant's manager at Denison, Texas, disclosing full knowledge of the fact of the mixture and its extent. The letter above referred to is as follows:

"DENISON, TEXAS, 1/20, 1903.

"Northern Texas Division, E. T. Hathaway, Manager.

"Mr. N. M. Carter, Agt., Guthrie.

"DEAR SIR: I am sorry to note from your favor of the 19th inst. that Dr. Davis, your driver, through error let about 300 gallons of gasoline run into your P. W. Oil storage tank, and cannot believe that this amount of gasoline will materially affect the burning quality of the P. W. Oil, at any rate, we will have to watch the matter, and take chances on selling all the P. W. Oil in P. W. Oil storage tank, trusting that same will give good results.

"Yours very truly, J. W. WAGNON,
"Asst. Mgr."

On the receipt of this letter the agent at Guthrie proceeded to sell the mixture of oil and gasoline to the various merchants in his territory as called for.

On January 28, three barrels of this oil, containing the mixture of gasoline, were sold to Powers & Deselms as ordinary coal oil, two barrels of which were emptied into a galvanized iron tank in
261 their store at Orlando, the tank being empty at the time. The other barrel was disposed of by them to another merchant. The oil, after the mixture, was not inspected in bulk in defendant's

tank, nor did the barrels shipped to Powers & Deselms bear any inspector's brand, nor was the contents of either barrel inspected while in the hands of Powers & Deselms and before sale. It appears from the invoice that inspection fees were added to the price of the oil in the sale to Powers & Deselms and neither Powers & Deselms, nor plaintiff had any knowledge of the mixture of gasoline with the oil until after the fire.

After the fire and on the following day, samples were taken from the tank of Powers & Deselms' store and sealed and submitted to Professor Holter, chemist of the Agricultural and Mechanical College at Stillwater.

On Sunday morning, February 1, 1903, the plaintiff, who was clerking in Powers & Deselms' store, went to the store with a two-gallon galvanized iron oil can and drew off from the contents of the tank containing the mixture, one gallon of the same and took it to his home and on the afternoon of the same day plaintiff left home to go to Purcell and was absent for several days, and at the time of the fire.

There is no surviving eye-witness to the origin of the fire. The plaintiff's dwelling was a small one story building, 12 by 14 feet, standing lengthwise east and west, and divided into two rooms, the east room about 10 by 12, being used for a kitchen, and the west room, about 12 by 12 feet, as a general living and sleeping room. The cook stove was near the east wall of the kitchen, and the heating stove (one of the vertical cylindrical type, composed of a conical firebox and a cylindrical plate metal body with a door in the
262 side) was on the east side of the living room, and both stoves connected with a brick flue in the partion wall. The walls of the building were constructed of studding, weatherboarded on the outside and lathed on the inside, the lath being covered with cloth and paper, and not plastered. From the time of the delivery of the oil can containing the mixture of oil and gasoline at plaintiff's house, on Sunday, until Tuesday evening the can was not used or handled, but on Tuesday the plaintiff's sister, Mrs. Emory, who was staying with his family during his absence, filled a new lamp from the contents of the can and lighted it and almost immediately after lighting it the flame shot out of the lamp chimney, and she turned it down and blew it out, but had to blow several times to extinguish the flame. Thinking it was the fault of the wick, she trimmed the wick and lit it again, when it immediately performed in the same manner, and she extinguished it and did not light it any more. She left the oil can in the kitchen near the southwest corner by the washstand. It was a warm evening and they let the fires go out.

On the following morning the plaintiff's sister, Mrs. Emory, got up and lighted the kitchen fire and they cooked breakfast, and Mrs. Emory then went to kindle a fire in the heating stove. She shook down the ashes, examined the ash pan and asserts there were but few ashes in the pan and the stove was cold. Mrs. Deselms then called her to assist in dressing the children, and she did so, not hav-

ing put anything in the stove. Mrs. Deselms said she would start the fire in the heating stove after breakfast. This witness testified quite positively that there was no fire in the stove at the time she left the house, about eight o'clock A. M., to go to the store where she was employed, and she was the last person to see either of the three deceased persons alive.

263 The plaintiff's house was discovered to be on fire at about ten o'clock in the forenoon, and upon the arrival of the first person on the scene, it was so completely ablaze that it was impossible, on account of smoke and gases to force an entrance into the building. About nine o'clock in the morning it had blown up cold from the northwest, and there was a high wind blowing from that direction at the time the fire occurred. Mr. Bradshaw was the first person to arrive at the building and he broke in the back or kitchen door and tried to get into the other room, but was choked down by the dense smoke and gas and came out. He tried a second time to enter the house and was again choked and smothered by the smoke and gas and had to retreat. He then ran around the house and tried to get in otherwise. About this time others came and they broke in the north wall and found the plaintiff's son lying face downward on the bed near the northwest corner of the house badly burned and life extinct, probably from suffocation. As the smoke cleared somewhat from the room they could see the body of the plaintiff's wife lying on the floor and what remained of the little girl on a couch. By pushing the building partly over, the charred bodies were taken out before the fire had completely burned out.

After the fire and after the remains of the building had fallen in and been pushed aside and the fire partly extinguished, the heating stove was found inclined to the northwest from the floor being partly burned out beneath it; the top was off the stove and the upper hinge to the door broken, the door hanging by the lower hinge. There was paper, kindling and wood in the stove just a little charred. The plaintiff's wife was lying with her feet near the stove, her head away from it in a westerly direction in front of the stove door.

264 Near her body was found the top or conical part of the oil can, the body of the can being found four to seven feet away in a southwesterly direction. These were the conditions existing at the time the fire was subdued sufficiently to admit of examination by those present.

The evidence further disclosed that the children were both very nice, bright, healthy and active children. The boy Fred, was four years old, and the little girl two years old. Neither had ever been sick and both were in perfect health at the time of the fire.

The foregoing is a substantial statement of the facts developed upon the trial of said cause, as the same are shown by the record filed in this court.

The cause was tried at the February, 1905, term of the District Court of Logan County, to the court and a jury, at the conclusion of which trial the jury returned a verdict in favor of the plaintiff for $14,500.00. In due time a motion for a new trial was filed, con-

sidered by the court and overruled, and judgment rendered on the verdict. From this judgment and the order overruling the motion for a new trial the cause comes to this court by case-made.

Opinion of the Court by GILLETTE, *J.*:

We have set forth the foregoing unusually elaborate statement of facts, because it is manifest the case is one which must be determined almost exclusively from circumstantial evidence.

The first objection urged by the plaintiff in error for a reversal of the judgment rendered in the cause, is the claimed insufficiency of the evidence to support the verdict and judgment, and under this head it is argued: "That the plaintiff's case is not made by
265 showing the negligent admixture and his purchase of a portion of that mixture. He also takes the burden of proving it to have been the efficient cause of the fire; that the accident would not have happened if the oil had not had the gasoline in it."

We are inclined to think this a fair statement of the burden cast upon the plaintiff and we are also inclined to think this requirement of the law has been fairly complied with by the evidence in this case.

The fact of the admixture of the coal oil and gasoline by the agents of the plaintiff in error, its knowledge of the mixture and its acts in knowingly placing the same upon the market; the sale and delivery of three barrels of the mixture to the firm of Powers & Deselms, the purchase of one gallon by the plaintiff, the taking of it in a two gallon can to his residence, the fire and the death of the plaintiff's wife and children, are established facts; and that the wife and two children of defendant in error lost their lives in the fire that destroyed their home there is no question. What was the proximate cause of this fire becomes, therefore, the important question to be determined in this case. The jury before whom the cause was tried have answered this question, but because the sufficiency of the evidence to sustain their verdict is questioned, it becomes necessary for this court to look into the evidence sufficiently to determine whether there was any evidence submitted to them upon which such verdict could reasonably be founded. As we have already said, the evidence connecting the plaintiff in error with the origin of the fire is entirely circumstantial and we are, therefore, called upon to analyze with some care the probative force of these circumstances. That coal oil as derived from the earth is unfit for commercial purposes, and that it is refined mainly for the purpose of fitting it for illuminating purposes, *i. e.*, for the purpose of removing from
266 it both detrimental and dangerous elements is well known by all persons, and hence a matter of common knowledge.

The oil contained in the storage tank had been refined, and the refined product had been inspected and tested by the Territorial oil inspector, and had by him been certified to comply with the territorial law in respect to safety and suitability as a salable product under the law. This, however, was before the admixture of gasoline with it. It was sold to Powers and Deselms after such admixture

without farther inspection, and without notice. That the admixture of the gasoline with the oil after inspection of the oil, changed its condition to a product more dangerous, and that the sale of such admixture for general use as coal oil, without farther inspection, was a transaction in violation of the law, must be conceded. The positive testimony of Professor Holter, of the dangerous and explosive character of this mixture, which is charged as being the proximate cause of the death of the two children; the circumstance of the new lamp filled with this fluid the night before the fire, and its threatening and dangerous performance when lighted, presented to the jury such an array of proof that this court cannot now say that there was no evidence, or that there was not sufficient evidence before the jury to warrant it in concluding that the mixture of coal oil and gasoline, thus put upon the market, by the plaintiff in error, was dangerous to use as coal oil, and that the plaintiff in error was guilty of negligence in thus marketing the same without giving notice of its real constituents. It is true that they did not sell it directly to the defendant in error, but it is also true that they sold it to their vendee, under such circumstances as to charge them with knowledge that it would be resold to consumers, and, having such knowledge, it was by the plaintiff in error put upon the market,
267 and allowed to go into the channels of trade by the agents of the plaintiff in error with directions to "watch the same and take chances, trusting that the same will give good results." Such a transaction, so knowingly entered into, we think, charges the plaintiff in error with the responsibilities of gross negligence.

With reference to the charge of contributory negligence contained in the answer of plaintiff in error, no proof having been introduced other than is shown by the general evidence in the case, which raises a presumption that the wife of defendant in error was at the time of the accident engaged in — act of kindling a fire with the use of the oil, we cannot hold that such defense is sustained. The use of coal oil for such purpose is too common and too well known for the court to say that it was negligence on her part to so use it, beside the instinct of self-preservation justifies the presumption that in so using it, she did so with due care.

Ellis *v.* Republic Oil Co., 110 N. W. 20 (Iowa).

With think it advisable in this connection to notice the second ground of error presented in brief of plaintiff in error, to wit: that it was error to admit in evidence the letter of the assistant manager, to the local agent, for the reason stated, that it added no new fact, but was simply "an inflammatory text for counsel, in an inflammatory case, directed to an inflammable jury." This criticism may be true, yet the fact that it is true does not necessarily destroy its materiality and admissability as evidence. The fact of the mixture that plaintiff in error knew it, and sold it as ordinary illuminating oil, was admitted, but there was no admission that the company knew it to be dangerous, when used as coal oil is ordinarily used, and this letter was competent of consideration by the jury, in deter-

mining whether the company, at the time of the sale knew,
268 or had knowledge of facts sufficient to put it upon inquiry with reference to its dangerous qualities. The letter, together with the testimony of expert witnesses, whose testimony was directed to the question as to the extent such admixture would increase the inflammability and dangerous character of the article sold, as compared with the article for which it was sold, was competent of consideration in determining the negligence of the plaintiff in error, and the conclusions drawn by the jury from the evidence so submitted, is not, we think, open to question by this court.

It yet remains to connect this dangerous and explosive mixture with the death of these two children, and here we are met with the proposition to be determined wholly from circumstantial evidence. The sufficiency of the circumstances and probative facts shown by the testimony, are challenged as not being sufficient to justify the conclusion reached by the jury, that the death of the children was the result of the explosion of the coal oil and gasoline mixture which the plaintiff had purchased and taken to his home. It would be an exceedingly difficult task to draw an exact line, which would bound the powers of a jury, in concluding that a fact sought to be shown, had been shown by reasonable inference.

In fact, we think no rule could be laid down to meet the requirements of all cases, for each case of this character carries with it its own "ear marks," and it must be judged by that special insignia as they appeal to our reasoning faculties. In so judging this case it is not necessary that the probative facts established should be such as to amount to a mathematical certainty of the existence of the fact sought to be established, or that by reason of the facts shown a scientific demonstration of the existence of the ultimate fact, could be adduced.

We think that where a known agency is shown to exist
269 which is sufficient and liable to produce the result complained of, and is traced to a position in which it might produce such result, and the result has been produced, and there was no other known agency at that point capable of producing such a result, a strong inference is raised that such known agency was the proximate cause of the injury that follows, and to this extent this case is clear, since the evidence clearly shows the existence of such condition at the time of the fire.

Such inference drawn from such facts alone, might not be sufficient, but taken with the other probative facts presented, as for instance, the sister starting to build a fire in the sitting room, shook down the ashes in the stove, found the stove cold and no fire in it; was then called from the stove to assist in dressing the children; Mrs. Deselms stating that she would herself build the fire after breakfast; Mrs. Deselms body found on the floor with her feet close to the stove and her head away from the stove; the door open and one of the hinges broken; kindling, consisting of paper and small wood in the stove, not burned but somewhat charred; the two children dead in the same room with her; the fact that Mr. Bradshaw

arrived at the house before the fire had become general in the building and attempted to go in, and was choked with gas and smoke and compelled to retreat, made a second attempt and was again driven out by the accumulated gas and smoke, as he testified, choking him down the worst kind, leads to the conclusion that these deaths were the result of an extraordinary and powerful agency; and proof of what this agency was is shown by the fact that the oil can which contained the mixture of oil and gasoline, sold by plaintiff in error, sitting out in the room where it had not been kept up to that time, with the whole conical top of the can off, points with such
270 an unerring finger to that can and that mixture, as the cause of the death of those persons, as that all men at once reach a satisfactory conclusion as to how these deaths occurred, which takes it out of the realm of mere conjecture; and in view of the fact that no other reasonable explanation or hypothesis has been presented which would account for the frightful result, it is beyond the power of this court to say that the jury were not justified in the conclusion reached by their general verdict. Under such circumstances the conclusion reached is almost as satisfactory as if it had been reached by reason of the direct testimony of eye-witnesses. The authorities grant to both courts and juries considerable latitude in inferring the existence of the ultimate fact sought to be established from probative facts shown on the trial of the cause. The author of Cyc. in his test under the title of Inferences from Evidence, Vol. 17, pg. 820, says:

"When a material fact is not proved by direct testimony, it may be rationally inferred by the court or jury from the facts which have been so proved, even though the inference be not a necessary one."

The Supreme Court of the United States in Insurance Co. *vs.* Wade, 78 U. S. 440, says:

"It is well settled that if the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury. It would be a narrow rule, and not conducive to the ends of justice to exclude it on the ground that it did not afford full proof of the non-existence of the disputed fact. Besides presumptive evidence proceeds on the theory that the jury can infer the existenc of a fact from another fact that is proved and most usually accompanying it."

271 The Supreme Court of New Hampshire, 13 Atlantic, Clark *v.* Manchester, pg. 869, says:

"When a material fact is not proved by direct testimony it may be inferred by the jury, (if it is a case for them) from the facts which have been so proved, even though the inference be not a necessary one. It is their province to draw proper inferences from such facts, and if, in the exercise of this right, they conclude that the fact in controversy is established, it is as properly proved as if by direct testimony."

Citing Corn *v.* Doherty, 137 Mass., 245.

The Supreme Court of Missouri in Conner *v.* Pac. Ry. Co., 81 S. W. 149, says:

"It is with reluctance that appellate courts interfere with the province of juries in passing upon questions of fact. Whenever from all the facts and circumstances in evidence, a jury may, without doing violence to the dictates of reason and common sense, infer a given fact on account of its known relation to the fact proved, the court should not interpose its own different conclusion."

In fact no court has ever denied the power of a court or jury to infer the existence of a fact from circumstances proved. The only question being as to whether or not the fact inferred was a reasonable inference. If it is a reasonable inference, although not a necessary one, the court would invade the province of the jury in denying to them the right to say that such reasonable inference was the proximate cause of the injury.

We think we could not deny the jury in this case, under the facts shown, the right to conclude that the death of the children was the result of the negligence of the plaintiff in error.

272 It is urged by the plaintiff in error that the court erred in giving instruction No. 4, to the jury, which instruction is as follows:

"By the laws of this Territory, dealers in illuminating oils and gasolines are prohibited from selling any such oils or gasoline until the same shall have been inspected by the Territorial Oil Inspector and have been pronounced of a quality permitted to be sold, and any person violating such law is made liable for a penalty, in a criminal prosecution. All illuminating oils or fluids that flash at a less temperature than 120 degrees Fahrenheit, and have not a specific gravity of not less than 46 degrees Baume, that is, all oils that fail to stand both tests, are required to be 'rejected,' (and all gasoline used in vapor stoves and gasoline lamps shall have a specific gravity of not less than 70 degrees Baume at a temperature of 60 degrees Fahrenheit. Oils and gasolines which do not come up to the tests prescribed by our laws are not permitted to be sold for domestic purposes."

This instruction submitted to the jury the provisions of the Oklahoma statute as a basis for their guidance in determining the question of the negligence of the plaintiff in error in the sale of the oil, and it is urged that such statute was void in that it is utterly unintelligible and an instruction which submits the substances of the statute as a basis for the jury's guidance is, therefore, erroneous.

The point is made that the flash test provided for in the statute and submitted in the instruction, and the specific gravity test therein provided for, are so inharmonious in the result obtained from each that a strict enforcement of the provisions of the statute would exclude from Oklahoma some of the best oil produced in the

273 United States. The principal complaint with reference to the statute arises from the testimony of one Robinson who showed by his testimony that the provisions of the statute requiring oils sold in the Territory of Oklahoma to show a specific gravity of 46 degrees, Baume test, is unintelligible so far as a test of the best com-

mercial grades of oil are concerned; that in order that the Baume specific gravity test should mean anything to an inspector, such inspector would have to know from what locality the crude oil from which it was manufactured came; that Texas oil show a test of 38½ to 40 degrees; Kansas, 41½ to 42; Ohio, 43 to 47 degrees, and Pennsylvania, 44 to 49 degrees; that each are of equal value and safety, possessing merely the variation due to characteristics of the crude oil, of the localities from *from* which they are produced.

From this stand point counsel argue that it clearly appears that the gravity test has no relation whatever to the safety or quality of the oil, because equally good oil, as shown by the testimony of Robinson, would be excluded from the Territory by the test required by the statute. The argument of counsel for plaintiff in error, that certain oils might be excluded from the Territory under the statutory tests may be true, and yet we do not see how we could declare a statute void for that reason, or an instruction based thereon erroneous. The statute is one which relates to the general welfare of the people of the territory and is intended as a protection to their lives. Such legislation is within the police power of the Territory and a proper subject of legislation and the legislature of the Territory having prescribed a test which oil must stand to be lawfully sold within the Territory, this court, under this testimony which shows that it is possible to bring this product within the requirements of the law, cannot declare such a law to be unconstitutional. Nor
274 for that purpose could the court hear testimony which tended to show that some other specific gravity test would be equally good or better, as applied to the general welfare of the people, than that fixed by the legislature. The constitutionality of a law must be determined by its requirements tested by the constitutional limitations upon that subject.

It is urged that the provisions of Sec. 4, of the Act of the Legislature approved March 8, 1899, Laws of 1899, pg. 188, is void because of an unequal punishment therein provided for persons and corporations performing the same act. That section of the act provides that any persons or any employee or agent of any corporation, selling oil and gasoline when the same is not of the grade required by the act as found by the inspector of oils, shall be deemed guilty of a misdemeanor and punished by fine and imprisonment; and then provides that:

"Any company or corporation who shall furnish in this Territory oils or gasoline for sale in this Territory of lower grade than herein specified, shall be subject to a fine of $1000.00."

The legislature here manifestly intended to provide a punishment for all persons and corporations violating the provisions of the act. The punishment or imprisonment provided for individuals could not be inflicted upon an artificial person such as corporations, and they therefore made the fine as to corporations heavier than that imposed upon individuals who in addition to their fine suffered imprisonment. Whether this could be rightfully done or not we do not find it necessary to decide in this case, because the constitutionality of this single provision might, if the same were involved

in this case, be determined one way or the other without effecting the remainder of the act.

If the punishment here provided for corporations violating
275 the provisions of the act should fail, it would nevertheless be an unlawful transaction to sell in this Territory oil which would not stand the test provided for in section 2 of the act, which provisions are the only ones immediately called in question in this case and which we have already held are constitutional.

It is urged that instructions No. 5, 6, and 7, submitted to the jury by the court below, each present an erroneous proposition. Counsel in their brief say, "these three instructions concurrently present the same objection. It is first contended that the plaintiff had no right to go to the jury on the question as to the usual and ordinary purposes for which coal oil is ordinarily used, nor to have submitted to the jury any supposed custom, because those are matters of pleading and practice and the evidence is entirely silent on the subject, as well as being unsupported by any allegation in the petition."

With this contention of the plaintiff in error we are not able to agree. Ordinary coal oil has been in general use so long and the use of it so universal for purposes other than illumination that all persons of ordinary intelligence have knowledge of the general purposes for which it is used, and to make it safe for such uses the legislature has prescribed a test which must be complied with in placing the same upon the market for use in this Territory, and it is not within the province of dealer, after an injury has been inflicted by the use of the oil which he has sold that is not of the standard required by the law, to say that he is not liable for damages arising by reason of such injury occasioned by its use within the general custom and experience of the people in the usage thereof and which custom is a matter of general knowledge.

Proof of a general knowledge of a custom or usage of a
276 product of this kind is not the subject of expert testimony.

Upon the trial of the case the plaintiff offered a witness, Prof. Holter, to show the customary uses to which the people in general put coal oil, and for the purpose of qualifying him to give such testimony, he was asked:

"State whether or not you have had occasion to learn or observe frequently throughout the country or community the uses that people generally put coal oil to."

To which question the plaintiff in error objected as follows:

"Objected to as incompetent, irrelevant and immaterial under the issues in this case;" and the court in considering of such objection and in sustaining the same used the following language:

"Matters of common knowledge and experience it is not necessary to prove at all, but matters of usage it is necessary to prove."

The question here under consideration is a question of general knowledge of a usage to which coal oil is generally put, and the immediate subject under investigation was whether or not it was g-nerally known that coal oil was used in kindling fires. This inquiry was relevant to the issue because the plaintiff in error in the

sale of this oil was bound to know with reference thereto that which was a matter of general knowledge.

In the instruction complained of the jury were advised in instruction No. 7, as follows:

"If you find that the wife of the plaintiff was, at the time of the accident, using the oil to kindle or aid in starting a fire in the stove, you will then determine whether the use of coal oil to kindle or start fires is a usage or custom so general and universal as to be a part of the general knowledge and experience of persons of average intelligence and experienced, and if the defendant at the time
277 it sold said oil had reason to believe that it would be used for such purposes."

Manifestly the court here authorized the jury to find whether or not the usage and custom of starting fires with coal oil was so general and universal as to be a part of the general knowledge and experience of persons of average intelligence, and they were advised that if this was not found to be a fact their verdict should be in favor of the plaintiff in error.

What is a matter of general knowledge, as we have stated, is not the subject of expert testimony, nor can the people generally be called upon the witness stand to prove the existence of such a fact, and when the court directed the jury to find against the plaintiff, unless from general knowledge they could determine that it was customary to kindle fires with coal oil, general knowledge was invoked from which and by reason of which, the fact sought to be established could be determined, and what is a matter of general knowledge the jury as well as the court might take notice of.

In Ellis *v.* Republic Oil Co. 110 N. W. 23, the Supreme Court of Iowa says: "The use of kerosene in kindling fires is too common and too well known for us to say that a person using reasonable care may not use that agency without being chargeable with negligence. See Cyc. Vol. 16, pg. 849, and particularly pg. 852; where the author in his text says:

"Jurors may act upon matters of common observation within their general knowledge without any testimony on those matters." Citing: 2 Gray, 514; Murdock *v.* Summer, 22 Pic. (Mass.) 156; Spingler *v.* Williams, 67 Miss. 1.

The Supreme Court of the United States in Brown *v.* Piper, 91 U. S. 42, say:

278 "Of private and special facts, in trials in equity and at law the court or jury, as the case may be, is bound carefully to exclude the influence of all previous knowledge. But there are many things of which judicial cognizance may be taken. To require proof of every fact as that Calias is beyond the jurisdiction of the Court, would be utterly and absolutely absurd. Facts of universal notoriety need not be proved." Citing Taylor's Evid. Sec. 4, note 2.

The court having excluded testimony which tended to show that the use of coal oil in kindling fires was a matter of general knowledge, because it was a matter of general knowledge, might properly have advised them in his instructions that proof upon that subject

was not necessary and that it might be assumed to be an established fact because of the common knowledge that such fact existed. That such course was not pursued, but on the contrary the jury were instructed to determine whether the use of coal oil to kindle or start a fire is a usage or custom so general and universal as to be a part of the general knowledge and experience of persons of average intelligence and experience, and if the defendant at the time — sold said oil had reason to believe it might be used for such purposes, left it to the jury to determine what the court might have determined, to wit, that the custom of starting fires with the use of coal oil was a matter of general knowledge, and in this we are unable to perceive prejudicial error.

The objection of the plaintiff in error to the refusal of the court to give instruction No. 5, as requested by the plaintiff in error, is based upon the assumption that the law of 1899 is void because of defects pointed out in sections 2 and 4 of said act, and therefore, the law of 1895, Ses. Laws of 1895, pg. 134) is still in force, and said instruction was framed to cover the provisions of that statute.

279 Having heretofore determined that the law of 1899 was not void, but still in force, such determination disposes of this objection.

The exception to the ruling of the court in refusing instruction No. 11, as requested by plaintiff in error, is determined adversely to it in sustaining instructions 5, 6, and 7 given by the court upon the trial of the case.

There remains but one other ground of error complained of and that is that the verdict is excessive. The plaintiff in error has cited many cases from different states in which the courts have held that less sums than that allowed for the death of these children have been held excessive. In each case the action of the court is founded upon the peculiar facts of the case before it.

The legislature of this Territory for the purpose of abridging the powers of the jury in assessing excessive damages have fixed limits upon their power to award damages for the death of an individual at $10,000.00. No uniform and precise rule can be laid down by which the value of a life to those entitled to recover therefor must be measured. The jury under the facts and circumstances of each peculiar case, must within the limits of the statute determine such matter of compensation.

The plaintiff in error has moved for a new trial in this case.

"First, because of excessive damages having been given under the influence of passion and prejudice, and

Second, error in assessment of the amount of recovery, the same being too large."

With reference to the first ground in view of the fact that no special evidence of passion or prejudice other than the amount of the verdict has been pointed out, the determination of the

280 trial court adversely to this ground was the exercise of a better advised judgment than is possible to be entered here.

With reference to the second ground that the verdict is excessive while yet within the limit of the statute, this court is called upon

to interpose its judgment for that of the jury trying the case. We have before us no fact or circumstance which would justify such action, and are therefore content in consideration of all the facts in the case shown by the record to allow the award of the jury to stand.

Finding no reversible error in the trial of the cause, the judgment of the court below is affirmed. All the justices concurring except Burford, C. J., who tried the case in the court below, not sitting, and Burwell, J., who concurs in the judgment but not in all of the reasons given for the same.

281 In the Supreme Court of the Territory of Oklahoma.

UNITED STATES OF AMERICA, *Territory of Oklahoma, ss:*

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that the foregoing 280 pages, numbered from 1 to 280, inclusive, are a true and complete transcript of the record and all proceedings in said Supreme Court in the case of Waters Pierce Oil Company, Plaintiff in error, *vs.* Albert B. Deselms, Defendant in error, as the same remains upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Guthrie, this 10th day of April, A. D. 1907.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Endorsed on cover: File No. 20,669. Oklahoma Territory supreme court. Term No. 282. Waters Pierce Oil Company, plaintiff in error, *vs.* Albert B. Deselms. Filed April 19th, 1907. File No. 20,669.

Office Supreme Court, U. S.
FILED.
DEC 14 1908
JAMES H. McKENNEY,
Clerk.

No. 62.

IN THE

SUPREME COURT OF THE UNITED STATES

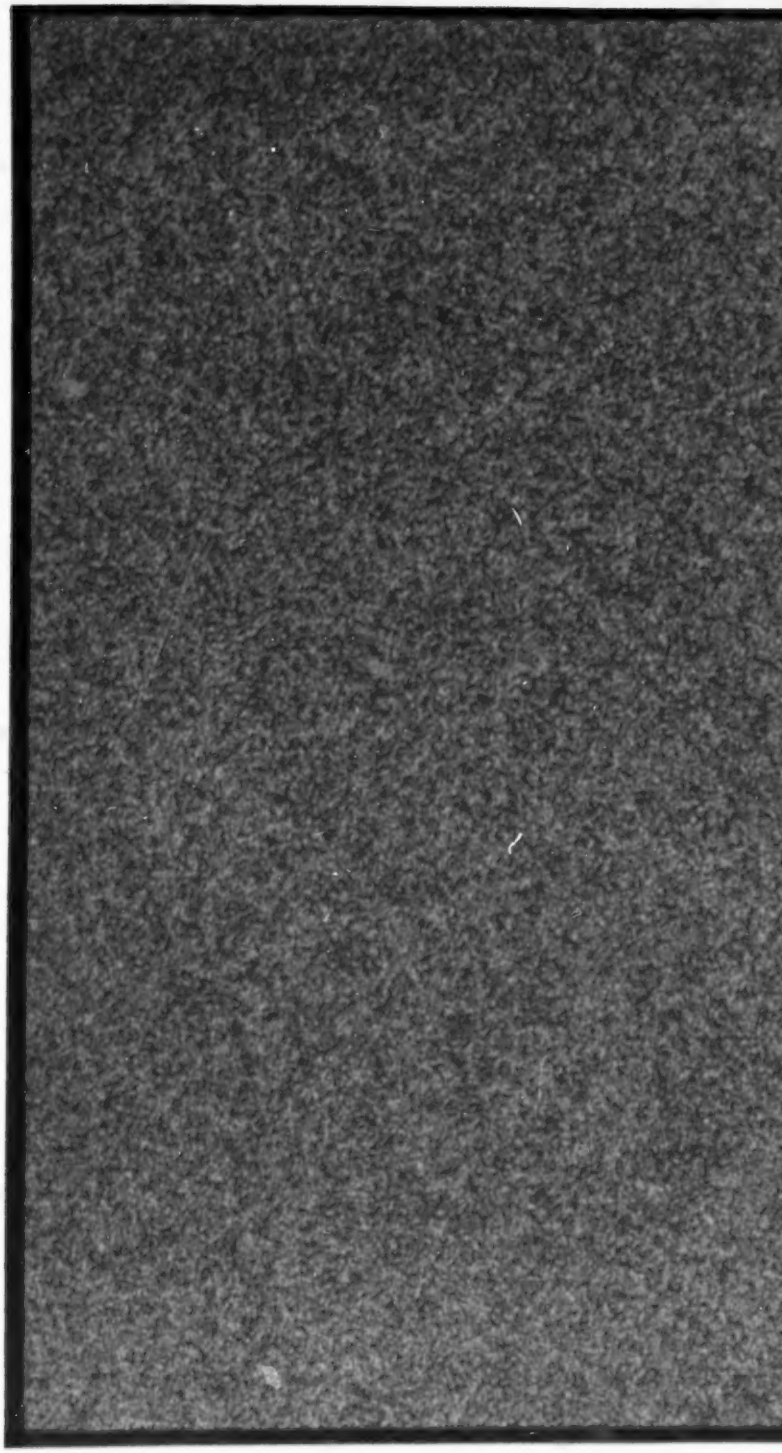
No. 20,669

WATERS PIERCE OIL COMPANY, PLAINTIFF IN ERROR

vs.

ALBERT B. DESELMS, DEFENDENT IN ERROR

BRIEF OF PLAINTIFF IN ERROR



IN THE

SUPREME COURT OF THE UNITED STATES

No. 20,669

WATERS PIERCE OIL COMPANY, PLAINTIFF IN ERROR

vs.

ALBERT B. DESELMS, DEFENDENT IN ERROR

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF FACTS.

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1 **Of the pleadings and orders.**

On the 29th day of March, 1903, the defendant in error as plaintiff brought this suit in the District Court of Logan County, Territory of Oklahoma, to recover thirty thousand ($30,000.00) dollars of the plaintiff in error, defendant in the court below. The petition is in three counts. The first count alleges that the Waters Pierce Oil Company at and prior to the 28th day of January, 1903, was engaged in the business of a jobber or wholesaler of coal oil and gasoline in Oklahoma, and to have had a tank station in Guthrie, where it kept oil and gasoline in storage for shipment to retail dealers; that some time previous to the date named the employees of the defendant had mistakenly mingled some gasoline with coal oil, producing thereby a dangerous mixture, and knowingly vended and sold a portion of this mixture to the firm of Powers & Deselms, retail merchants at Orlando, Oklahoma, and that the plaintiff purchased a gallon of this mixture and took it to his home in an ordinary oil can, and by reason of the dangerous and explosive character of the mixture, on the 4th day of February, 1903, it exploded, set fire to plaintiffs' house, and caused the death of plaintiff's wife, Rosalie Deselms. The second count is precisely like the first except that it counts on the death, produced in the same explosion and fire, of Fred. S. Deselms, the plaintiff's four year-old son, as is, also, the third count, except that it claims damages for the death of plaintiff's daughter, two years old, Genora Deselms. The defendant, on the 5th day of April, 1903, filed its answer, which was a general denial, and an allegation that, if the accident complained

of occurred it was caused by the negligence of the said Rosalie Deselms directly contributing thereto. To this answer the plaintiff filed a reply of general denial. (See Record, page 12 for petition, page 17 for answer, and page 17-18 for reply.) On the 28th day of February, 1905, the plaintiff, by leave of the court, dismissed his first cause of action. (Record, p. 18-19). The case was tried on the 3rd day of March, 1905, to the court and a jury. The jury returned a verdict in favor of the plaintiff for $14,500.00 for the death of the two children. The plaintiff filed a motion for a new trial (Record 146), which was overruled and excepted to (Record, p. 147), and judgment rendered on the verdict and exception taken. (Record, pp. 147-148).

2 **Extent and character of the mixture of the oil and gasoline, and knowledge of defendant thereof.**

The defendant on the trial admitted that on the 18th day of January, 1903, there was an accidental mixture in a tank of oil containing 6,666 gallons of coal oil of 305 gallons gasoline. The defendant was at once apprised of the mixture and, on full consideration of the fact, directed its agent in charge of the tank to sell the contents thereof as ordinary illuminating coal oil. The defendant's manager at Guthrie, N. M. Carter, testified to the same fact, and there was also introduced in evidence a letter dater January 20, 1903, from the defendant's manager at Denison, Texas, disclosing full knowledge of the fact of the mixture and its extent, and he directed Carter to proceed with the sale of the oil, and in accordance with these instructions the same was sold to various retail dealers in his territory as called for. (See Record, pp. 20 to 25 inc.)

3 **Sale of oil to Powers & Deselms.**

On January 28th three barrels of oil containing the mixture of gasoline were sold to Powers & Deselms as ordinary coal oil, two barrels of which were emptied into a galvanized iron tank in their store, the tank being empty at the time. The other barrel was disposed of by them to another merchant. The oil, after the mixture, was not inspected in bulk in defendant's tank, nor did the barrels shipped to Powers & Deselms bear any inspector's brand, nor was the contents of either barrel inspected while in the hands of Powers & Deselms and before sale. It appears from the invoice that inspection fees were added to the price of the oil in the sale to Powers & Deselms. Neither Powers & Deselms nor plaintiff had any knowledge of the mixture of gasoline with the oil until after the fire. (See testimony of Carter, pp. 22-23; invoice 26; Powers 26-27; Muehler 38.)

4 **Sale of the oil at retail to plaintiff.**

On Sunday morning, February 1st, 1903, the plaintiff, who was clerking in Powers & Deselms' store, went to the store with a two-gallon galvanized iron oil can and drew off from the contents of the tank containing the mixture, one gallon of the oil and took it to his home. (See Record, pp. 40-41.) On Sunday afternoon the plaintiff

left the town of Orlando and went to Purcell, and was absent for several days and at the time of the fire.

5 **Of evidence touching the cause of the fire.**

There is no surviving witness of the origin of the fire or its cause. The plaintiff's house consisted of two rooms, and the building was 24 feet east and west by 12 feet north and south. The east room, 10x12 feet, was used as a kitchen and dining room, and the west room, 12x12 feet, as a living and bed room. The cook stove was near the east wall of the kitchen, and the heating stove, of the ordinary cylindrical type, was on the east side of the living room and both stoves connected with a brick flue in the partition wall. The walls were constructed of studding, weather-boarded on the outside, lathed on the inside, the lath covered with cloth and paper and not plastered. From the time of the delivery of the oil can containing the mixture, at plaintiff's house, on Sunday, until Tuesday evening the can was not used or touched, but on Tuesday evening the plaintiff's sister, who was living with his family during his absence, Mrs. Emory, filled a new lamp with the contents of the can and lighted it, and shortly after lighting, the flame shot out through the lamp globe, and she turned it down and extinguished it, thinking it was the fault of the wick. She trimmed the wick and lighted it again when it performed in the same fashion, and she extinguished it. She left the oil can in the southwest corner of the kitchen. It was a pleasant, agreeable evening, and they had let the fires go down. On the following morning Mrs. Emory, the plaintiff's sister, got up and lighted the kitchen fire and they cooked breakfast. The witness went to kindle a fire in the heating stove, and had shaken down the ashes through the grate preparatory to building the fire when Mrs. Deselms asked her to assist in dressing the children, and informed her that she would make a fire after breakfast, and the witness did nothing further with reference thereto, but testified quite positively that there was no fire in the stove at the time the winess left the house at 8 o'clock to go to the store where she was working. She was the last person to see either of the three deceased persons alive.

The plaintiff's house was discovered to be on fire about 10 o'clock in the forenoon, and upon the arrival of the first person on the scene was so completely ablaze that it was impossible, on account of smoke and gases, to force an entrance into the building. About 9 o'clock in the morning it had blown up cold from the northwest, and there was a high wind blowing from that direction, and as the crowd gathered they broke in the north wall, and found the plaintiff's son lying face downward on the bed near the northwest corner of the house, somewhat burned, and life extinct, probably from suffocation. They later discovered, as the fire progressed, the body of the little girl, badly burned, on a couch, and the body of the plaintiff's wife lying on the floor. They were, by pushing the building partly over, taken out before the fire had completely burned out. After the fire and after the debris had fallen in and the fire was partly extinguished, the heating stove was found inclined at a sharp angle, partly settled through the remains of the floor, which

was almost entirely consumed, and one hinge to its door broken and the door hanging by the other hinge. The lid was also off the top of the stove. The stove contained wood, corn cobs, kindling and paper, which was slightly charred. The plaintiff's wife was lying near the stove, with her feet toward it and her head away from it in a southerly direction, and near the body was found the top or conical portion of the oil can, the body of the can being from four to seven feet away in a northwesterly direction. The condition of the stove and the oil can was ascertained after the fire had burned itself out, by the witnesses who examined the debris.

The above is a complete statement of the testimony of the witnesses on this subject, reference being made to the testimony of Powers, pp. 29-37; of the plaintiff, 40-42; Bradshaw, 49-56; Cowan, 56-60; Scott, 60-64; Emory, 43-48.

6 **Of the evidence as to the extent of plaintiff's damage.**

The testimony shows that the boy, Fred, was about four years old; considered a healthy child, active, good, nice child, and liked by the people. The little girl was a sweet little girl, everybody who came in touch with her could not help from loving her . Testimony of Powers, 29; plaintiff, 39-40; Mrs. Emory, 43; Mr. Everest, 53.

ASSIGNMENT OF ERRORS.

The plaintiff in error relies upon the following assignments of error for a reversal of the decision in this court:

I.

To the insufficiency of the evidence to warrant a recovery, raised by the third, fourth and twelfth assignments on the Writ of Error, as follows:

3 The court erred in affirming the action of the court below in overruling the demurrer of the plaintiff in error to the evidence introduced by the defendant in error in the court below, because the same fails to prove facts sufficient to constitute any cause of action in favor of the defendant in error and against the plaintiff in error.

4 The court erred in affirming the action of the court below in refusing to grant the request by the plaintiff in error for a peremptory instruction at the close of the trial in the court below.

The Court erred in sustaining the action of the court below in overruling the motion for a new trial filed by the plaintiff in error in the court below.

II.

The Court erred in its treatment of the question of privity between a wholesaler of oils and a remote vendee at retail, raised by the assignments of error, as follows:

5 The Court erred in affirming the action of the court below in giving Instruction No. 4 to the jury, which instruction is in the words and figures following, to-wit:

"By the laws of this Territory, dealers in illuminating oils and gasoline are prohibited from selling any such oils or gasoline until the same shall have been inspected by the Territorial Coal Oil Inspector and have been pronounced of a quality permitted to be sold, and any person violating such law is made liable for a penalty, in a criminal prosecution. All illuminating oils or fluids that flash at a less temperature than 120 degrees Fahrenheit, and have not a specific gravity of not less than 46 degrees Baume, that is, all oils that fail to stand both tests, are required to be 'rejected,' and all gasolines used in vapor stoves and gasoline lamps shall have a specific gravity of not less than 70 degrees Baume at a temperature of 60 degrees Fahrenheit. Oils and gasolines which do not come up to the tests prescribed by our laws are not permitted to be sold for domestic purposes."

6 The court erred in affirming the action of the court below in giving Instruction No. 5 to the jury, which instruction is in the words and figures following, to-wit:

"If you find from a preponderance of the evidence that the defendant, Waters Pierce Oil Company, knowingly sold a mixture of coal oil and gasoline to Powers and Deselms, to be by them sold as coal oil, in the usual and ordinary manner as retail merchants, and that said mixture was of a highly inflammable, explosive and dangerous character when used with reasonable and ordinary caution, for the usual and ordinary purposes for which coal oil is usually and generally used, and that the plaintiff procured a portion of said mixture from Powers and Deselms to be used for coal oil and carried the same to his home in a coal oil can, and that while handling the same with ordinary care and caution in such manner as an ordinarily prudent person ordinarily uses or handles the same and for the purpose for which coal oil is usually, generally and ordinarily used, and that while so handling the same, said mixture exploded or caused an explosion, which killed and burned the plaintiff's chi'dren, you will then return your verdict in favor of the plaintiff and assess his damgaes at such sum as you shall determine to be reasonably commensurate."

The court erred in affirming the action of the court below in giving Instruction No. 6 to the jury, which instruction is in the words and figures following, to-wit:

"One of the material questions for you to determine is, whether or not the fluid sold in this instance was reasonably safe for the purposes for which it was sold, or whether it was dangerous to be used as coal oil. If the defendant sold an uninspected or rejected fluid which was more dangerous than the quality prescribed by law, and the plaintiff or his wife had no knowledge or notice of the dangerous quality, and while using it with ordinary care and caution such as ordinarily prudent persons would exercise under similar circumstances and for the uses and purposes for which coal oil

is usually and generally intended and used, such fluid exploded or took fire and caused the death of plaintiff's children, the defendant is liable in damages."

8 The court erred in affirming the action of the court below in giving Instruction No. 7 to the jury, which instruction is in the words and figures following, to-wit:

"Another important and material question for your determination is whether or not the use of the fluid sold in any manner caused the accident complained of, and, if it caused it, the manner of causing it. You cannot base your determination upon mere supposition or conjecture, but you are permitted to find such facts proven as are the rational and reasonable inferences from other facts proven. If you find that the wife of plaintiff was at the time of the accident using the oil to kindle or aid in starting a fire in the stove, you will then determine whether the making use of coal oil to kindle on start fires in a usage or custom so general and universal as to be a part of the general knowledge and experience of persons of average intelligence and experience, and if the defendant at the time it sold said oil had reason to believe that it would be used for such purposes. If it is not the general and usual custom to use coal oil for kindling fires, and the defendant when it sold the fluid to Powers & Deselms to be resold, had no reason to believe it would be sold for such purposes, and the use of it for such purpose was the cause of the accident, then the plaintiff is not entitle to recover."

9 That the court erred in affirming the action of the court below in refusing to give Instruction No. 5, requested by the plaintiff in error in the court below, which instruction is in the words and figures following, to-wit:

"If you believe from the evidence in this case that the defendant sold to the firm of retail dealers three barrels of a mixture of oil and gasoline and shipped the same to such firm of retail dealers in packages which were not branded by the public inspector of oils, or any of his deputies, as approved standard oil, and such oil was a mixture unsafe and dangerous in its character and that an inspection of such oil by the public inspector previous to its being sold at retail by the firm of retailers would have disclosed its dangerous character and resulted in the same being branded rejected, you are then instructed that said firm of retailers would be guilty of a criminal violation of the law in selling such oil for illuminating purposes, and, if you believe from the evidence but for such failure to inspect such oil or have the same inspected by the said firm or retail dealers the accident in controversy in this case would not have happened it will be your duty to find in favor of the defendant in this case."

10 The court erred in affirming the action of the court below in refusing to give Instruction No. 11 requested by the plaintiff in error in the court below, which instruction is in the words and figures following, to-wit:

"Even if you find the mixture of oil and gasoline in controversy

in this case to have been a dangerous substance and to have been negligently put on the market by the defendant, unless the plaintiff has satisfied you by a preponderance of the evidence that the defendant sold and marketed the oil with the expectation that it would be retailed and used for other than illuminating purposes, and that the defendant intended in placing it on the market that it should be so used and the accident resulted from making a different or other use of the oil and by using the same for fuel or kindling fires in stoves, it will be your duty to find for the defendant in the case."

III.

The court erred in its treatment of the amount of damages recoverable and recovered, raised in the folloving assignments of error.

11 The court erred in affirming the action of the court below in modifying request No. 14 of the plaintiff in error in the court below, which instruction so requested was in words and figures as follows, to-wit:

"In determining the amount of your verdict for the plaintiff, if you find for such a plaintiff, you should not tale into consideration the pain suffered by the deceased or the wounded feelings of the father or other surviving relatives, but your verlict must be limited to such amount, if any, as you believe the phintiff has suffered financially by reason of the death of his children. In other words, the recovery, if any, is to be a pecuniary compensation for a pecuniary loss, and such finding of loss must be based upon the evidence introduced in the case."

To which the court below added:

"The amount of damages cannot be fixed by the evidence, but must be the result of your own judgments."

12 The court erred in sustaining the action of the court below in overruling the motion for a new trial filed by the plaintiff in error in the court below.

13 The court erred in affirming the judgment rendered in favor of the defendant in error and against plaintiff in error for the recovery of fourteen thousand five hundred ($14,500.00) dollars, in the court below.

14 The court erred in affirming the action of the court below in sustaining the amount of damages awarded by the jury in said cause, the same being excessive.'

ARGUMENT.

I.

The plaintiff's case is not made by showing the negligent admixture and his purchase of a portion of that mixture. He also takes the burden of proving it to have been the efficient cause of the fire; that the accident would not have happened if the oil had not had the gasoline in it; and that the accident is the result of its super-inflammability.

Haff vs. Minneapolis & St. Louis Ry. Co., 14 Fed. 558.
Willoughby vs. Chicago & N. W. Ry. 37 Ia., 432;
Kelsey vs. Jewett, 28 Hun. 51;
Central R. R. vs. Freeman, 75 Ga. 331;
Harrizan vs. Chicago & I. R. Co., 53 Ill. App. 344;
A. T. S. & F. R. R. Co. vs. Aderhold, 49 Pac. 83;
Mobile & O. R. Co. vs. Wilson, 76 Fed. 127.

"This fact of casual connection between an alleged negligent act or omission and an injury can no more be presumed than the act or omission itself. Mo. Pac. Ry. Co. vs. Porter, 73 Tex. 307, 11 S. W. 324; T. & N. O. Ry. Co. vs. Crowder, 63 Tex., 505. Our reference to the last case makes it proper for us to say that there is no presumption that the deceased were guilty of contributory negligence, and that the burden of proof was not upon the plaintiffs to show that the deceased were not so guilty. But neither is there a presumption that the defendant was guilty of negligence *which caused their deaths. The facts of the case are, however, at least as suggestive of negligence on their part contributing to their deaths as they are of such negligence on the part of the servants.*" Texas & Pac. R. Co. vs. Shoemaker, 84 S. W. 1049.

"The party who affirms negligence must establish it by proof sufficient to satisfy reasonable and well balanced minds. The evidence must show more than the probability of a negligent act. *An inference cannot be drawn from a presumption,* but must be founded upon some fact legally established. This court has repeatedly held that when liability depends upon carelessness or fault of a person, or his agents, the right of recovery depends upon the same being shown by competent evidence, and it is encumbent upon such a plaintiff to furnish evidence to show how and why the accident occurred—some fact or facts by which it can be determined by the jury and not be left entirely to conjectures, guess or random judgment, upon mere supposition without a single known fact. C. & O. Ry. Co. vs. Sparrow's Adm'r., 98 Va. 630, 641, 37 S. E. 302; N. & W. R. R. Co. vs. Cromer's Adm'r., 99 Va. 763, 40 S. E. 54; Southern R. R. Co. vs. Hall's Adm'r. 102 Va. 135; 45 S. E. 867.

It is also well settled that when damages are claimed for injuries inflicted through the alleged negligence of the defendant not only is the burden of showing negligence by a preponderence of the

evidence upon the plaintiff, but, *if the injury may have resulted from one of two causes, for one of which the defendant is responsible, but not for the other, the plaintiff cannot recover; neither can he recover if it is just as probable that the damage was caused by the one as by the other.* N. & W. Ry. Co. vs. Poole's Adm'r. 100 Va. 148, 40 S. E. 627; Northington vs. Norfolk Ry. & Light Co., 102 Va. 446, 40 S. E. 475."

C. & O. Ry. Co. vs. Heath (Va.), 48 S. E., 508.

"To fix the liability upon the master for injuries sustained by a servant while engaged in his employment, the negligence of the master as the proximate cause of the injury must be proved by affirmative evidence, which must show more than a probability of a negligent act. Bailey. Mast Laib. P. 503 et seq.

Among the cases cited by the author is Sorenson vs. Pulp Co. 56 Wis. 338, 14 N. W. 446, in which the court says: 'When liability depends upon carelessness or fault of a person or his agents, the right of recovery depends upon the same being shown by competent evidence; and it is incumbent upon such a plaintiff to furnish evidence to show how and why the accident occurred—some fact or facts by which it can be determined by the jury, and not be left entirely to conjecture, guess or random judgment upon mere supposition, without a single known fact.' In this case the only fact establishel was that an employe of the defendant was found bruised and dead in a hole which had been cut through the floor in the defendant's mill, and in which was water about six inches deep. How he came there was left entirely to inference, and it was under those facts that the court said that every party to an action at law has a right to insist upon a verdict or finding based upon the law and the evidence in the case, and not, in the absence of evidence, upon mere inference, conjecture or personal experience.

In Lehman vs. City of Brooklyn, 29 Barb. 234, a child was found drowned in a well on which the cover had been negligently left open. Suit was brought against the city and the opinion of the court says: 'The gist of the action, however, is negligence, which must be made out and established from proof. The proof need not be direct and positive, by someone who witnessed the occurrence and saw how it happened, but it must be such as to satisfy reasonable and well balanced minds that it resulted from the negligence of the defendant. It is not safe to say that because there was a well in the street, and a child was found drowned within half an hour after he was seen in health, the defendant's negligence is made out. To entitle plaintiff to recover, it must appear affirmatively that the accident resulted wholly from negligence of the defendant and that the negligence and imprudence of the plaintiff did not contribute to the result." See also, Payne vs. Railroad Co., 40 N. Y. Super. Ct. 8; Stager vs. Railway Co., (Pa. Sup.) 12 Atl. 821;

C. & O. Ry vs. Sparrow's Adm'r., 37 S. E. 302.

"In Bailey's Pers. Inj., Sec. 1672, *et seq.* the law upon this point is clearly and tersely stated: Where it is necessary to show a

certain state of facts, it is not sufficient to prove two or more different states of case, one of which may be sufficient, but either of which may equally, under the testimony have existed.

* * * *

Where the evidence is equally consistent with either view, the existence or non-existence of negligence, it is not competent for the judge to leave the matter to the jury. The party who affirms the negligence has failed to establish it. This is a rule which never ought to be lost sight of.

'An inference cannot be drawn from a presumption but must be founded upon some fact legally established.'

N. & W. Ry. Co. vs. Cromer's Adm'r., 40 S. E., 54.

See, also, So. Ry. Co. vs. Hall's Adm'r., 45 S. E., 867.

"Where damages are claimed for injuries which may have resulted from one or two causes for one of which the defendant is responsible and the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause. And he must also fail if it is just as probable that the damages were caused by the one as by the other, since the plaintiff is bound to make out his case by the preponderence of the evidence. Searles vs. Railway Co., 101 N. Y. 661, 5 N. E. 66; 1 Shear. & R. Neg., Sec. 57; Railway Co. vs. Sparrow's Adm'r, 98 Va., at pages 640, 641, 37 S. E. 305, 306."

N. & W. Ry. Co. vs Poole's Adm'r, 40 S. E., 627.

See, also, Northington vs. Ry., 46 S. E., 475.

"Where there are two or more possible causes of an injury, for one or more of which the defendant is not responsible, the plaintiff, in order to recover, must show by evidence that the injury was wholly or partly the result of that cause, which would render the defendant liable. If the evidence in the case leaves it just as probable that the injury was the result of one cause as the other, the plaintiff cannot recover. Grant vs. Railroad Co., 133 N. Y. 657, 31 N. E. 220; Hanrahan vs. Railroad Co., 17 App. Div. 588-592, 45 N. Y. Supp. 474."

Yaggle vs. Allen, 48 N. Y. Supp. 827.

See, also, Grant vs. Railroad, 31 N. E. 220.

"When the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible, and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damages were produced by the former cause, and he must fail, also, if it is just as probable that they were caused by the one as by the other, as the plaintiff is bound to make out his case by the preponderence of the evidence. The jury must not be left to mere conjecture; and a bare possibility that the damages were caused in consequence of the negligence and unskillfulness of the defendant is not sufficient."

Searles vs. Manhattan Ry., 5 N. E. 66.

"The case virtually stands in simply this situation: The property was adjacent. Sparks did occasionally come from the chimney; falling down, some say, to the ground, and others not. They were never seen to set fire to anything, unless it may be conceded they did at the time Nyberg testifies he saw the leaves on fire. The case is without proof which tends to show how, or in what way, or what form the fire started. This show the difficulty of the present inquiry. The burden rests upon the plaintiffs to show affirmatively not only that the fire might have proceeded from the defendant's use of its property, but they must make it fairly certain, by reasonably affirmative evidence, that it did so originate. 2 Shear R. Neg. (4th Ed.) Sec. 675; Railroad Co. vs. De Graff, 2 Colo. App. 4229 Pac. 664; Railroad Co. vs. Yerger, 73 Pa. St. 494; Cooley Torts (2nd Ed.) 702."

Pueblo Light Co. vs. McGinley, 38 Pac. 425.

"All the evidence was to the effect that it was as probable that one cause produced the injury as that the other did. There was no conflict in the evidence upon that subject. Was there then any evidence whatever connecting the injury complained of which the negligent act of the servant, as the effect of that negligence? We think not."

McBroom vs. Putney, 28 Ind. 353.

"It is made manifest from those cases that this court maintained the distinction between cases where the evidence tends to prove the cause of the accident and those in which the verdict is reached in the absence of proof upon a mere guess of conjecture. The rule is very clearly announced and the distinction sharply drawn in Glick vs. Ry. Co., 57 Mo. App. 97, where it is said by the court: 'It is with reluctance that appellate courts interfere with the province of juries in passing upon questions of fact. Whenever from all the facts and circumstances in evidence, a jury may, without doing violence to the dictates of reason and common sense, infer a given fact on account of its known relation to the fact proved, the court should not interpose its own different conclusion. But, while this is correct, the due protection of property rights demands that the court should draw the line with a firm hand between tangible evidence and reasonable legitimate deductions and mere conjecture or speculation.'"

Connor vs. Pac. Ry. (Mo.), 81 S. W. 149.

See, also, Oglesby vs. Mo. Pac. (Mo.), 76 S. W. 623.

"The burden of proof is primarily upon a plaintiff to prove the negligence charged. It is not enough to show an accident and an injury. A casual connection must be established between the accident and the negligence charged in order to make out a case for the jury. Failing in this, as this plaintiff did, the court should take the case from the jury, because, if it was submitted to the jury, and if a verdict was returned for the plaintiff, it could not stand for the

reason that it would have no foundation in law or in fact to rest upon. Hollman vs. Railroad Co., 62 Mo. 562; Sorenson vs. Paper Co., 56 Wis. 338, 14 N. W. 446. In other words, the mere concurrence of negligence and injury does not make the defendant liable. There must be a direct connection between the negligent act and the injury, and the negligence must be the proximate cause of the injury. Reed vs. Railroad, 50 Mo. App. 504; Stepp vs. Railroad, 85 Mo. 229; Moberly vs. Railroad, 17 Mo. App. 518; Stoneman vs. Railroad, 58 Mo. 503; Harlan vs. Railroad, 65 Mo. 22; Nolan vs. Shickle, 3 Mo. App. 300; Id. 60 Mo. 336; Settle vs. Railroad, 127 Mo. 336, 30 S. W. 125, 48 Am. St. Rep. 633; Kennayde vs. Railroad, 45 Mo. 255; Stanley vs. Railroad, 114 Mo. 606, 21 S. W. 832. If the injury may have resulted from one of two causes, for one of which and not the other the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result; and if the evidence leaves it to conjecture, the plaintiff must fail in his action. Smart vs. Kansas City, 91 Mo. App. 586; Epperson vs. Telegraph Co., 155 Mo. 346, 50 S. W. 795, 55 S. W. 1050; Smith vs. Bank, 99 Mass. 605, 97 Am. Dec. 59; Searles vs. Railroad, 101 N. Y. 661, 5 N. E. 66; Pierce vs. Kile, 80 Fed. 865, 26 C. C. A. 201."

Warner vs. St. Louis M. R. R. Co. (Mo.), 77 S. W. 67.

Also, Bowers vs. Bristol Gas & Elec. Co., 42 S. E. 296.

"The facts apearing in the case disclose no error in the direction of a verdict for the defendants. In any permissible view of the evidence, the plaintiff leaves the cause of her intestate's death wholly conjectural. Upon this vital point it is simply shown that he was found lying dead in a passway between the defendant's office and one of their shops; that a heavy ladder, which had been put up against the shop some hours before and left unfastened with its foot projecting into the passway some seven or eight feet, was lying on the ground near his body; that when he was so discovered 'it was windy and gusty' and had been for an hour or so preceding, so that the ladder might have blown down upon him and caused his death; and 'that it is dangerous to leave ladders as this one was, because of their liklihood of being blown down.' This evidence manifestly does not afford the legitimate medium of proof recognized by the law and which the plaintiff has the burden of establishing. U. S. vs. Ross, 92 U. S. 281, 282, 283, 23 L. Ed. 707. 'The law demands proof, and not mere surmises.' Bond vs. Smith, 113 N. Y. 378, 385, 21 N. E. 128. Merely because the intestate was found lying dead in proximity to the ladder, it is not to be inferred as a conclusion of fact or as a presumption of law that the ladder caused his death by blowing down upon him or in any other way; and a *fortiori*, in the absence of any evidence of physical injury, or as to the condition of his health, and when his death may have resulted from any one of several well recognized and not infrequent natural causes. U. S. vs. Ross and Bond vs. Smith, *supra*; Deschenes vs. Rairoad, 69 N. H. 285, 288, 46 Atl. 467; Horan vs. Byrnes, 70 N. H. 531, 533, 49 Atl. 661."

Dame vs. Laconia Car Co. Works, 52 Atl. 864.

To consitute actionable negligence, there must be not only casual connection between the negligence complained of and the injury suffered, but the connection must be by natural and unbroken sequence, without intervening efficient causes, so that, but for the negligence of the defendant, the injury would not have occurred."

Decatur Car Wheel Co. vs. Mehaffe y(Ga.), 29 So. 646.

The evidence on which to base inferences was stronger in the case of Waters Pierce Oil Co. vs. Van Eldren, decided by the Circuit Court of Appeals for the Eighth Circuit, 137 Fed. 557, than in the present case. It was said in that case:

"While it may be said that all this was matter for the consideration of the jury, it does not acentuate the fact and deepen the impression that this whole case, as against the oil company, was made to order. The evidence as against it throughout rests upon conjecture and speculative theories unsustained by reliant affirmative testimony, and by building upon one presumption another presumption. The doctrine of *locus ipsa loquitur*, invoked by counsel for defendants in error, can have little force for the reason that the decided weight of the evidence shows that there was another place for the escape of oil, which speaks louder than at the receiving box."

"It is not sufficient for the employe to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

Patton vs. Texas etc. Ry., 179 U. S. 658.

"While an injury by external force might have caused it to develop, it may also have developed without such cause. Before the plaintiff can recover on account of the expenses and suffering caused, * * * she must establish that the relation of cause and effect existed between the fall and them. But when we look into the evidence we find that it merely establishes a condition which might have been caused by an injury to the breast at that time, but whether such injury did occur is, under it, but a matter of surmise. The existence of a fact is not proven by evidence of a subsequent condition which is merely consistent with its existence."

Trapnell vs. City, 76 Ia. 746.

Now, when we come to test the proofs in this case connecting the oil with the fire, there is no evidence that the oil was one of its pro

ducing factors or was any way involved at its inception, although if it be said that if that the inmates of the house were unable to escape therefrom and were destroyed in the conflagration, that the origin of the fire must have been so sudden as to cut off the possibility of self-preservation, and would have involved the actors in instantaneous destruction, and that this result could have been consummated only by some highly inflammable substance, there being such an inflammable substance present on the premises in the shape of oil, and direct indications point to the fact that the receptacle had been transported either by volition of some one or by the force of an explosion, from he place where usually kept to what might be supposed to be the immediate scene of the fire, there might possiby be sufficient facts and circumstances from which an inference could be fairly drawn, that the oil in question was involved in the conflagration at its inception or soon afterwards. Here, however, ends every semblance of anything that could be called proof. The same circumstances that exhibit the possibility of the oil being involved in the inception of the fire, or having been an early secondary consequence of the fire, just as clearly points to the concurrence of human volition in manipulating the oil. Now, if we assume that the circumstances sufficiently show that the oil was involved in the origin of the fire, three legal phases of the situation might be possible under the proof:

1. That the oil was carefully handled by the deceased and it accidently caught fire, under circumstances wherein any good oil would have done the same thing.

2. That it might have been carefuly handled by the deceased, Mrs. Deselms, and took fire under circumstances attributed solely to the excessive gasoline on account of its extra on enhanced inflammability.

3. That it was carelessly handled by the deceased and took fire under circumstances wherein good oil would have behaved in the same manner, or wherein the excess of inflammability concurring with the carelessness of the deceased produced the accident.

On page 68 of the record, Professor Holter was asked the question as to whether if from half to one-third pint of mixture of 95 per cent oil and 5 per cent gasoline was poured in a stove on wood and kindling, without particular haste, and the oil can should be set down and a lighted match applied, an explosion would likely occur; to which the witness answered: "It does not necessariy follow that an explosion would occur. The gasoline vapor is heavier than the air, and the gas would diffuse in the velocity which is inverse in proportion to the square roots of their densities. Now, if I myself knew that there was gasoline in there, I wouldn't take the chance of lighting a match to that kerosene mixture for fear sufficient diffusion has taken place." "An explosion would likely occur, not necessarily, but would likely occur." "It would depend upon the length of time and the amount of surface over which the gasoline or the mixture containing the gasoline was poured."

He was also asked if a can was setting within three or five feet

of the stove and in the same room with the spout open, whether it would cause an explosion of the oil can. To which he answered: "Under the conditions stated, it does not necessarily follow that it would, but it may, and I believe I can quote sufficient authorities on that subject and show similar things have occurred." "The conditions are such that it may, and it may not occur; it is possible."

Witness on page 80 of the record answered that the ignition from the stove of a can setting nearby, being a closed can with spout merely would be very improbable, and, in the same connection, on page 81, states that if there were coals and fire in the stove that the probable effect would be to ignite the oil at the mouth of the can and that would be much more likely to get fire in that fashion than to flash across the atmosphere. Witnes also states on page 81 that, if the gas diffused through the room so as to make an explosive atmosphere, it would be improbable that the oil in the can would catch on fire from such an explosion. He, also, states on pages 81-82 that the communication of fire from a stove to the can through the intervening atmosphere while not impossible is wholly unlikely.

Professor Ringer, pages 87-88, testifies that pouring one-fourth to one-half pint of a mixture of 95 per cent coal oil and 5 per cent gasoline on wood and kindling in a stove and lighting it, without particular haste, there would be danger of an explosion. "I don't say it would occur, but there would be danger in it," depending on the temperature of the room and whether calculated to produce the highest rate of diffusion also depends on the length of time. Some people would light it quicker than others would, but, taking the average, my opinion would be that there would not be more than equal chance, or perhaps the chances would be rather against an explosion. The witness also states, page 89, that it would be hard to say that such an explosion would reach the contents of an oil can setting on the floor five feet away. "It is possible," but does not state it to be probable. This witness also testified, page 94, that, if the stove had fire or embers in it, there would be an explosion, and the explosion would be sure to involve both the can and the stove.

Witness Chauvenet, (R. pp. 99-102) introduced by the defendant, testifies to twenty-five years' experience analyzing and handling oils as a chemist; that the oil in question is a safe oil to use as an illuminating oil, and states that he has produced such oils in his laboratory from many sources made by the Standard Oil Company in the various agencies and parts of the United States, and that he knows the business and character of oils made in the country generaly for twenty-five years last past, and that the mixture in controversy is about the average in volatility used generally in the United States, and that the oil in question compares favorably with the average oil sold in the country at large. With reference to the mixture used for the purpose of kindling a fire, he says that the danger of an explosion in a stove would depend on the amount of wood and other kindling, the surface over which the oil was diffused, and the condition of the draft of the stove, whether open or closed, the temperature of the room. "There might be an explosion or might not, under the conditions named." He testifies that the differenec

between an oil with the 4 per cent mixture and ordinary illuminating oil would be inappreciative with respect to producing an explosion. He also testifies that under the conditions assumed—that it was cool enough in the room to require the making of a fire, that there would be little danger of such an explosion reaching the oil can. He also testifies that if there was fire in the stove, or coals, and a person would pour oil from the can into it, that it would result in an explosion. He, also, testifies that such an explosion would probably rend the can in pieces, and that kerosene is a more powerful explosive than gasoline, on account of having more substance to it, and that such an explosion would make, necessarily, a loud report. (R., 107-108.)

Out of these possible explanations or probabilities there is but one which would sustain a recovery, and that is that wherein the oil was cerefully handled, and that the accident was produced on account of the gasoline being mixed in the oil and under circumstances where the same would not have happened except for the mixture. For, if the negligence of the deceased either caused the accident or contributed thereto, there can be no recovery.

I Thompson on Negligence, Sec. 330.
Lake Erie R. R. Co. vs. Pike, 31 Ill. App. 90.
Grant vs. City of Fitchburg, 35 N. E. 84.

The next inference which the plaintiff seeks to draw from the evidence in laying the groundwork of establishing the defendant's liability, is that the deceased was using the oil in question for the purpose of kindling a fire in the heating stove. Laying aside, for the time being, the question of our liability, on what we claim was a misuse of the oil ,and for which we would not be liable to a remote vendee, the evidence fails to afford a legal basis to sustain any such inference. The facts from which, and from which alone, these inferences could possibly be drawn, subsist alone in the proximity of the wreck of the oil can and of the deceased, Mrs. Deselms, to the stove, and the stove's damaged top and broken door-hinge, found after the house had burned down. These facts mitigating against this theory, however, are that neither the stove, nor the oil can, were noticed in their position until after the house had fallen in and the damage and change of location might easily have been produced by other causes than those to which they are attributed. The slightly charred condition of the contents and no fire in the stove after the building had been burned down very strongly combat the theory that the oil had been used in kindling a fire in this stove at all, and point just as readily to the fact that the oil might have gotten on fire in the other room, and the deceased, in her effort to escape, might have borne it to the location where found; but if it be admitted that the evidence is sufficient to show that the fire started as claimed by plaintiff in the endeavor to kindle a fire in the heating stove, there is still a great gulf between the facts and conclusions wrought into this final inference, and the inference that it was excessive gasoline contained in the oil which produced the fire.

The most that can be said for this evidence, putting the strongest

conclusion on it possible, is that it discloses a theory which might be a possible explanation of the facts found. It does not even arise to a fulfillment of the statements of the case of Trapnell vs. City, *supra*, that "the existence of a fact it not proven by evidence of a subsequent condition which is merely consistent with its existence," but is in line with the statement of the condition named by Mr. Justice Brewer in Patton vs. Railroad, *supra*, and merely "shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not;" or, as more frequently stated, if the injury may have resulted from one or two causes, for one of which and not the other the defendant is liable, the plaintiff must show, with reasonable certainty, that the cause for which the defendant is liable produced the result; and if the evidence leads to conjecture, the plaintiff must fail in the action. Smart vs. Kansas City, *supra*.

The only possible chain of argument that could be put up that the intermixture of the gasoline and coal oil was the producing case of the accident would be: The intermixture is admitted; the evidence was conflicting on the proposition as to whether the inflammability of the mixture was substantially increased, and the jury having found that in favor of the plaintiff, it is therefore settled that the defendant was guilty of negligence in the sale of the oil and that this negligent admixture was present at the scene of the accident, was involved as one of its primary causes or primary effects, and that the presumption that the deceased exercised due care will close the gap between the proof of negligence and the resultant injury.

The difficulty with this argument is that there is no stronger presumption that the deceased exercised due care than there is, in the absence of proof, that the negligent admixture was not the cause of the accident. The presumption of freedom from contributory negligence is no stronger than the requiremnts for proof that the injury resulted from the alleged negligent act, and would involve the vice referred to in the authorities cited, *supra*, of building conjecture upon conjecture and presumption upon presumption; but even if the presumption that the deceased exercised due care were to be indulged as a stronger presumption than that against causation, there is still an intermediate ground of the ignition of the oil by accidental means, without any fault on the part of the deceased, yet under circumstances in which any oil would have produced the same result; and the field is open for conjecture and explanations of this kind: Was the oil can accidentally overturned and the oil spilled on the floor, and did a spark or coal come in contact with it; and did the deceased lose her life in an efort to extinguish it, or did the deceased's clothing catch on fire by accidental means and connect itself to the contents of the can, or to the children's clothing. Yet these are hypotheses of equal tenability with any of those advanced as the cause of the fire. Other could be suggested and possible explanations offered without limit. We, therefore, submit that the evidence is wholly insufficient to connect the alleged negligence

with the injury, and that the horrors of the case looped the gap and substituted guess work for proof.

"We held in Goodlanders Mill Co. vs. Standard Oil Co., *supra*, that petroleum oil is not a dangerous agency within the rule that he who uses it does so at his peril and must respond to the injuries thereby occasioned not caused by external natural occurrences, or by the interposition of strangers. It is dangerous when, in considerable quantity, it is brought in contact with fire. This is matter of public and general knowledge of which no American school boy of the age of fifteen years can be presumed to be ignorant and knowledge of which seems only to be ignored by the stupid servant who, in spite of repeated warnings, pours the fluid upon the fire, as we are periodically advised by the press."

Cleveland C. C. & L. Ry. Co. vs. Ballentine, 84 Fed. 935.

"It does not seem from these statements that there is any question about the facts, as far as they are the material, or with reference to any inference that can be drawn from them. It is plain that the plaintiff found fire in the fire box—found live coals there; that she placed her kindling wood upon the coals in the fire box, with the other wood upon it, and poured this oil upon the wood, intending to light a fire, not being content to wait until the kindling wood ignited from the coals; and that there was an explosion immediately. Now, of course, nobody will claim that there was anything in the nature of spontaneous combustion there, and it is plain that the explosion must have ocurred by the contact of that oil with the fire that was in the stove. It is true that the legislative act requires that kerosene shall stand a test of 120 degrees Fehrenheit before burning, which is construed by the inspectors as 'before flashing,' which is a higher test as I understand the testimony. There is no doubt that, if any of this kerosene reached the coals, it would instantaneously very much exceed a temperature of 120 degrees. One hundred and twenty degrees is, as I understand, a moderate amount of heat. It would simply be a slightly warm fluid at 120 degrees, while a live coal of fire is of a distinctly higher temperature, and if kerosene of the standard required by the statute would burn or even flash at 120 degrees, it would certainly, in contact with coals of fire, ignite, and it would form a gas instantaneously, which would ignite as instantaneously, and would pass back over the current of kerosene connected with it to the can. It would form gases as rapidly as it passed back, much as if it were a train of gunpowder that was being poured over a pan of fire. The fluid would be changed in that case into gas, and then into flame almost instantaneously. It seems to me that this must necessarily have happened in this case, and that there was nothing else needed to cause the explosion except fire, and the pouring of kerosene upon it from the can.

Now, there has been testimony introduced from witnesses on the part of the defendant, or from the cross-examination of defendant's witnesses, that it is customary with some men to make fires with the use of kerosene by pouring it upon kindling to light the fires. It is very possible that this may be done with entire safety if there

are no coals of fire in the stove, by putting the wood and kindling in the stove and pouring oil upon it, putting the oil can away and then applying the match to it. It is very probable that there will be no explosion under such circumstances; or, if there be a flash, then there will be no can near to explode. But, if there is fire in the stove, it seems to me that this case demonstrates the fact that there is great probability of an explosion; and that the nature of petroleum oils of all kinds, including that of kerosene, is well known to be such as a matter of common knowledge, that it is very dangerous to use them where they may come in contact with fire, and that when they come in contact with fire an explosion is very liable to occur.

It seems to me that I must hold as a matter of law, that it is a hazardous negligence to attempt to light a fire in a stove where there are either live coals or a blaze by the use of kerosene oil, even of the standard required by the statute."

Riggs vs. Standard Oil Co., 130 Fed. 302.

The burden of the argument of the courts below in meeting this issue is stated: "that where a known agency is shown to exist which is sufficient and liable to produce the results complained of, and is traced to a position where it might produce such result, and the result has been produced, and there was *no other known agency at that point capable of producing such a result*, a strong inference is raised that such known agency was the proximate cause of the injury."

We have no quarrel with this statement of the principle. Its fallacy consists in the mistaken assumption that there was no other known agency present capable of producing the same result. There was such an agency, namely: The oil without its superadded gasoline which might easily explain every circumstance connected with the case; the broken stove; the sudden conflagration, with no avenue of escape; the choking gases are all common and well known results of kerosene accidents and the oil without the gasoline, just as rationally explains the phenomena as the oil with it.

Loop vs. Litchfield, 42 N. Y. 351.
Losee vs. Clute, 51 N. Y. 494.
Davidson vs. Nichols, 93 Mass. 514.
Goodlander Mill Co. vs. Standard Oil Co., 63 Fed. 400.
Cleveland, etc., Rd. vs. Ballantyne, 84 Fed. 937.
Standard Oil Co. vs. Murray, 119 Fed. R. 575.

But our objection to the sufficiency of the evidence does not end here. The plaintiff in error had no contractual relations with the plaintiff, and, inorder to hold the plaintiff in error liable, in any event, it was necessary to show that the thing alleged to have caused the injury in the hands of a remote vendee was to put to the use for which it was intended in the sale from the original vendor.

There was no proof of any kind in the case that illuminating oil is in general use for kindling fires. It was sought, on the part of the

plaintiff, to prove a general custom among the people to so use it, but the testimony was excluded on the ground of the competency of the witness to testify on the subject. See evidence of Prof. Holter, R., page 74. This question was by the court as shown later remitted to the jury whether out of their general knowledge they know of any custom so universal to use illuminating oil for kindling fires as to create a presumption that binds the defendant to the knowledge of that use as one of the functions of illuminating oil.

The court ruled out the testimony of the experts offered on this point for failure to show competency to testify and submitted the same question to the jury, allowing them to be the judges of their own competency, depriving the defendant of every opportunity to combat the assumption of any such custom by proof as well as to assume that defendant must have known of such custom.

We submit that, under the authorities cited subsequently, in the absence of proof of intention, it must be admitted that ordinary kerosene oil is sold for lighting purposes as an illuminating oil, and not for use as fuel or in kindling fires.

II.

The Court Erred in Its Treatment of the Question of Privity Between the Wholesaler of Oil and a Remote Vendee at Retail.

(a) The court erred in giving Instruction No. 4 to the jury.

This instruction is based on Sec. 2 of Chap. 21, Session Laws 1899, page 187. This action is void, in that it is utterly unintelligible, when it is borne in mind that the Baume scale for liquids lighter than water is an inverse scale, so that a reading of 40 degrees denotes a heavier oil than a reading of 46 degrees. See Appendix No. 2.

The statute requires that the oil have "a specific gravity of not less than 46 degrees Baume." Specific gravity means weight. The primary and obvious meaning of the section would be that the oil must weigh at least as much as that indicated by 46 degrees on the Baume scale for liquids lighter than water.

Mr. Robinson, p. 121, testified that the only tests as to the safety of the burning quality of an oil is in the flash and burning tests. "The flash is the point at which the first flash is obtained from the vapor arising from the oil. The fire test is the point at which the same fluid, when the temperature is increased, will ignite and stay ignited until put out by some outside means."

This witness testified that he had been engaged in making tests of oil for twenty-one or twenty-two years, and that the only test which discloses the quality of the oil is its viscosity or body, allowing it to flow freely through a medium such as a wick, and that the specific gravity when the flash test is once ascertained, has not the slightest relation to its inflamability, and that while it is generally true that heavier liquids are less inflammable than lighter liquids, that the specific gravity of oils of the same quality vary according to the locality in which they are produced. "The fine oils produced from Pennsylvania crude show a higher reading when tested with the Baume hydrometer than oils produced from the Ohio crude. They likewise show a higher reading than the oils produced from the Kan-

sas and Territory crude. They also show a higher reading than the oils produced from the crudes produced in the vicinity of Beaumont, Texas;" presenting a variation from 10 to 12 degrees in gravity between the oils in the different localities, without variation in flash test. Oils refined from Kansas crude show that 41½ to 42½ degrees on the Baume scale as commercially used, while the Texas oils show 38½ to 40 degrees, ranging generally from 39 to 40 degrees while oils produced at Corsicana, Texas, range from 43 to 46 degrees. The Ohio oils range from 43 to 47 degrees and the Pennsylvania oils from 44 to 49 degrees. These all refer to oils of the best commercial grade and quality and of equal value and safety, possessing merely the variation due to the characteristics of the crude oil in the different localities from which they are produced. "We have found that some of the heaviest gravities produced are the freest burners and best illuminants. In other words, oil that is produced from Kansas crude are better illuminants and freer burning oil than the oil produced from the Ohio crude, which is several degrees lighter in gravity and this "from actual burning tests" involving the amounts of oil consumed in a given time at a given temperature, the amounts of incrustation on the wick, the clearness or cloudiness of the chimney and the distance that the flame drops in height during the time that the test is being made. (R p. 123). Putting a Baume scale into a sample of oil that should read 44 degrees, and I did not know where it came from, it would give me no information at all. If I knew that the illuminating oil was produced in Kansas and should show a specific gravity of 40, degrees, it might give me some information. Under these circumstances, before any specific gravity test would indicate anything about the oil, I would have to know where it is produced; and in response to a question by the court, the witness stated that if the oil inspector of the Territory of Oklahoma has no knowledge of where the oil he is testing comes from, he would obtain no information at all as to the character or quality of the oil by taking its specific gravity and that whether a light or heavy oil is the best depends altogether upon the section it comes from. If it is produced from the same crude, the lighter oil is the better illuminants if produced from different crudes you can get better illumi nants from some of the heavier oils than from some of the light oils.

Professor Chauvenel testified to the same effect. See Record p. 122-123.

Now, coming back to the construction of the statute, in question, it clearly appears that the gravity test has nothing whatever to do with the safety of the oil, whether you read it upward or downward, whether the oil shall show a reading of 48 degrees or upward on the Baume scale, though one thing is certain, that the requirements, in either case has no relation whatever to the safety or to the quality of the oil, because equally good oils as is shown by the testimony of Robinson would be excluded in either event; and it cannot be upheld as a police regulation, because if the statute is read downward on the Baume scale, it would exclude the Pennsylvania oils from the market, which are admitted to be just as good burning oils and just as safe as anything produced in the west; and if, on the other hand, this statute it read upward, it would have the effect to exclude

everything from the market of Oklahoma except Pennsylvania oils, and compel the people of the Territory to buy in the market and pay the freight on the same quality and the same attributes of oils, except weight, which has no relation to either the quality or the safety of the oil. This testimony is uncontradicted, and the law is void.

Priewe vs. Wisconsin State Land & Impr. Co., 67 N. W., Rep. 918.
State vs. Santel (Ia.) 82 N. W. R., 445.
Matter of Jacobs, 98 N. Y., 98;
State vs Smith, 58 Minn., 35;
State vs. Julow, 129 Mo. 163;
Janesville vs. Carpenter, 77 Wis., 288;
St. Louis vs. Door, (Mo.) 41 S. W. Rep. 1094;

In Mugler vs. Kansas, 123 U. S. 623-667, it is said:

"There are of necessity limits beyond which legislation cannot rightly go. * * * * The courts are not bound by mere facts, nor are they to be misled by mere pretenses. They are at liberty—indeed, under the solemn duty—to look at the substance of things whenever they enter upon inquiry whether the legislature has transcended the limits of its authority. If, therefore, the statute purporting to have been enacted to protect the public health, the public morals or as the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

Corrigan vs. Gage, 68 Mo. 541;
Haines vs. Cape May, 50 N. J. L. 55;
Kimmish vs. Ball, 129 U. S. 466;
Scholenberg vs. Penn., 171 U. S. 1;
Smyth vs. Ames, 169 U. S. 466;
Reagan vs. Farmers' L. & T. Co., 154 U. S. 362;
Railroad Co. vs. Gill, 156 U. S. 649;
People vs. Marx, 2 N. E. Rep. 29; 99 N. Y. 377.

Besides the court will take judicial notice of the facts which conclusively show that the gravity test of the act in question is not valid police regulation.

Sutherland on Stat. Constr., Secs. 301-306.

And the court is warranted in availing itself of all means in aid of its judicial knowledge where it is not personally cognizant of the facts of which it should take judicial notice.

Section 4, of the same Act, provides a punishment for corporations, but not for individuals, doing the same thing, and engaged in the same business, and is violative of the provision of the Constitution guaranteeing equal protection of the laws.

See in re Grice 79 Fed. R., 627;
Gulf, etc., Rd. Co. vs. Ellis, 165 U. S., 150;
Eden vs. People, 161 Ill., 296;
State vs. Santel (Ia.) 82 N. W. R., 445;
Connelly vs. Union Pipe Co., 184 U. S., 559.

The submission of the provisions of this law to the jury as the basis for their guidance in a suit not counting on the statute and a law which is clearly void in its entirety, was prejudicial error.

(a) The Court erred in giving instruction No. 5 to the jury.

(b) The Court erred in giving instruction No. 6 to the jury.

(c) The Court erred in giving instruction No. 7 of the jury.

Instruction No. 5 was an instruction covering the entire case, but limited the right of recovery to the usual and ordinary purposes for which coal oil is usually and generally used, using this expression twice in Instruction No. 5, and once in Instruction 6, and submitted the matter to the jury in Instruction 7, as follows:

"Another important and material question for your determination is whether or not the use of the fluid sold in any manner caused the accident complained of, and if it caused it, the manner of causing it. You cannot base your determination upon mere supposition or conjecture, but you are permitted to find such facts proven as are the rational and reasonable inferences from other facts proven. If you find that the wife of the plaintiff was, at the time of the accident, using the oil to kindle or aid in staring a fire in the stove, *you will then determine whether the use of coal oil to kindle or start fires is a usage or custom so general and universal as to be a part of the general knowledge and experience of persons of average intelligence and experience, and if the defendant at the time it sold said oil had reason to believe that it would be used for such purposes. If it is not the general and usual custom to use coal oil for kindling fires, and the defendant, when it sold the fluid to Powers & Deselms, to be resold, had no reason to believe that it would be sold for such purpurposes*, and the use of it for such purposes was the cause of the accident, then the plaintiff is not entitled to recover."

These three instructions concurrently present the same objection. It is first contended that the plaintiff had no right to go to the jury on the question as to the usual and ordinary purposes for which coal oil is ordinarily used, nor to have submitted to the jury a supposed custom, because those are matters of pleading and evidence, and the evidence is entirely silent on the subject, as well as being unsupported by any allegation in the petition.

Mobile Fruit Co. vs. Judy, 91 Ill. Ap., 82;
Lindley vs. Bank, 76 Ill., 629;
Hayden vs. Grillo, 42 Mo. Ap., 1;
Gans vs. Palo Pinto Co., 71 Tex., 99, 8 S. W. R., 634;
Hendricks vs. Middlebrooks, 44 S. E. R., 835.

If the custom had arisen into the dignity of a law of the land, it was the court's duty to have so instructed the jury as a matter of law, and not leave the subject to them to deal with.

Buyck vs. Schwing, 100 Ala., 355, 14 So. R., 48;
Robertson vs. Wilder, 69 Ga., 340.
Wilson vs. Bannan, 80 Ill., 493.
Careby vs. Frick, 8 Md., 163.

Custom or usage must be proved. The jury's knowledge of it cannot be availed of.

Senluc vs. Pritchard, 4 La., 160.
Tryson vs. Laidlaw, 18 La., 380.

It was not a custom dignified with a force the equivalent of a law of the land. It required pleading and proof, and could not be submitted to the jury in the absence of appropriate allegations supported by proof.

Packard vs. Van Scoic, 58 Ill., 79.
Randall vs. Koehler, 60 Md., 37, 11 Am. R., 169.
Murray vs. Hatch, 6 Mass., 465.
Livingston vs. Maryland, 7 Crauch, 506.

(e) The refusal of Instruction No. 5, requested by defendant.

This instruction reads as follows:

"If you believe from the evidence in this case that the defendant sold to the firm of retail dealers three barrels of a mixture of oil and gasoline and shipped the same to such firm of retail dealers in packages which were not branded by the public inspector of oils, or any of his deputies, as approved standard oil, and such oil was a mixture unsafe and dangerous in its character, and that an inspection of such oil by the public inspector previous to its being sold at retail by the said firm of retailers would have disclosed its dangerous character and resulted in the same being branded rejected, you are then instructed that said firm of retailers would be guilty of a criminal violation of the law in selling such oil for illuminating purposes, and, if you believe from the evidence but for such failure to inspect such oil or have the same inspected by the said firm of retail dealers the accident in controversy in this case would not have happened, it will be your duty to find in favor of the defendant in this case."

It is already seen and, we think, clearly established, that sections two and four of the coal oil inspection law of 1899 are void and of no effect, under the rule stated in Pollock vs. Farmers' Trust Co., 157 U. S., p. 427. The invalidity of these sections carries down with it that whole law. The law of the Territory on the subject of oil inspection was, therefore, the law of 1895.

Session Laws 1895, p. 174, Appendix No. 2

Under this law we claim that it is clearly contemplated that the inspection shall be in the hands of the retail dealer and applies to sales for actual consumption. It equally implies, or directly provides, for that matter, that if the barrels of oil received by the firm of Powers & Deselms did not have the inspector's brand on them, they should be inspected before being sold, and should be branded accordingly; and that if Powers & Deselms violated the law in selling uninspected or unbranded oil, and evidence clearly showing the flash test would have clearly procured its rejection, under the statute, the cause of the accident is transferred, and there is an inter-

vening efficient cause between the sale of the oil by the defendant in this case and its receipt by the plaintiff in the case.

(f) Erred in refusing to give Instruction No. 11, requested by defendant.

This instruction reads as follows:

"If though you find the mixture of oil and gasoline in controversy in this case to have been a dangerous substance, and to have been negligently put on the market by the defendant, unless the plaintiff has satisfied you by a preponderance of the evidence that the defendant sold and marketed the oil with the expectation that it would be retailed and used for other than illuminating purposes, and that the defendant intended in placing it on the market that it should be so used and the accident resulted from making a different or other use of the oil and by using the same for fuel or kindling fires in the stoves, it will be your duty to find for the defendant in the case.

We think this instruction correctly states the law and should have been given instead of the objectionable matter in Instructions 4, 5 and 6, covering the custom and the use of the oil. The authorities on this point are collected on the subject of the duties flowing from a remote vendor to a remote vendee, under the discussion of the sufficiency of the evidence in the case, and need not be repeated here.

III.

DAMAGES RECOVERED ARE EXCESSIVE.

We submit, in the first instance, that it was error on the part of the court to tell the jury that the question of damages cannot be fixed by the evidence but must be the result of your own judgment. While it is true that the amount of damages cannot be named or ascertained from specific evidence disclosing the amount of loss on the part of plaintiff, yet they must bear a relation to the evidence, and the vice of this instruction is that it cuts loose the minds of the jury from all regard to the evidence and it is needless to say that they went the instant they were turned loose. The authorities cited later will fully cover this point in this instruction.

The verdict of the jury for $14,500 for wrongfully causing the death of the four-year-old child and two-year-old child would denote an equivalent of $7,250 for each child. This is so far out of range to what any court has sustained that it seems there ought to be little difficulty in concluding, under the circumstances, that htis verdict is so thoroughly and utterly excessive that it should be set aside as tainting the entire action of the jury covering the entire ground work of the case.

The statute is quoted in Appendix 3.

In the case of Pennsylvania Co. vs. Lilly, 73 Ind. 252, a verdict for $1,800 for the death of a five-year-old child was reversed as excessive.

In the case of Vicksburg vs. McLean (Miss.) 6 So.Rep. 774, a verdict for $4,000 for the death of an eight-year-old child was held excessive.

In the case of Wells vs. Railroad Co., 78 N. Y. Sup. 999, $3,500 for the death of an eight-year-old child was held excessive.

In the case of Fleming vs. Loebel (N. J.), 59 Atl. 27, $2,000 for the death of a five-year-old child was held excessive.

In the case of Little Rock, etc., Ry. vs. Barker, 33 Ark. 350, a verdict for $4,500 for the death of a five-year-old child was held excessive, and in the same case and in 39th Ark. 491, a later verdict for $1,975 was sustained but criticised.

In the case of Myers vs. San Francisco, 42 Cal. 214, a verdict for $5,000 for the death of a seven-year-old child was sustained but expressly under a statute which did not limit the recovery to the pecuniary compensation of the survivors for the loss.

In the case of North Chicago, etc. R. R. vs. Wixon, 51 Ill. App. 307, a verdict for $5,000 for the death of a ten-year-old child was held excessive.

In the case of Parsons vs. Mo. Pac. Ry., 6 S. W. 464, 94 Mo. 286, a verdict for the death of an 18-year-old boy of $5,000 was held excessive.

In the case of Riley vs. Salt Lake R. Co., 37 Pac. 681, 10 U. 428, a verdict for $5,000 for the death of a seven-year-old boy was held excessive.

In the case of Hively vs. Webster Co., 91 N. W. 1041, 117 Ia. 672, a verdict for $6,000 for the death of a four-year-old child was held excessive.

In the case of Rowe vs. Telephone Co. (N. J.), 48 Atl. 523, $5,126 for the death of a twelve-year-old boy was held excessive.

In the case of Connaughton vs. Sun Prt. Co., 76 N. Y. Sup. 755, $5,250 for the death of an eight-year-old boy was held excessive.

In Graham vs. Traction Co., 44 Atl. 964, a verdict for $5,000 for the death of a four-year-old child was held excessive.

In Louisville & Nashville Co. vs. Creighton (Ky.) 50 S. W. 227 $10,500 for the death of a four-year-old child was held grossly excessive.

In West Chicago St. Ry. Co. vs. Nabie, 77 Ill. App. 176, $4,000 for the death of a three-year-old child was held excessive.

In the case of Fox vs. St. Ry. Co., 118 Cal. 55, 50 Pac. 25, a verdict for $6,000 for the death of a four-year-old child was held excessive.

In Con. Trac. Co. vs. Graham, 40 Atl. 773, a verdict for $5,000 for the death of a four-year-old child was held excessive.

In McDonald vs. Steel Co. (Mich.) 103 N. W. 829, a verdict for $7,487 for the death of a fourteen-year-old boy was held excessive.

Verdicts as high as five thousand dollars have been sustained in the following cases:

Houghkirk vs. Canal Co., 63 How. Prac. 328, $5,000 for the death of a six-year-old child.

Aken vs. Steele, 1 N. Y. Sup. 259, $4,500 for the death of a six-year-old child.

U. S. Brewing Co. vs. Saltenburg, 71 N. E. 1089; 211 Ill. 531, $5,000 for the death of a four-year-old child.

Chicago St. Ry. vs. Boyd, 95 Ill. App. 510, $5,000 for the death of a seven-year-old child.

Taylor vs. B. & H. Ry. Tex. Civ. App. 31 S. W. 66, $5,000 for the death of a seven-year-old child.

If the matter depended on a five thousand dollar verdict, it is seen that the overwhe'ming weight of authority of the country would set it aside. But we believe that no case can be found in the books, from any court, sustaining a verdict of the amount in the present controversy, even under statutes dissimilar as Illinois, Texas and New York are to ours, and where other elements are permitted than pecuniary compensation.

Respectfully submitted,

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APPENDIX NO. 1.

SESSION LAWS, 1895, OKLAHOMA, PAGE 174.

SECTION 1. That the governor shall appoint for the Territory of Oklahoma an inspector of coal oil, carbon oil, petroleum, kerosene oil, gasoline, or any other product of petroleum used as illuminating or burning fluids by whatever name known, which may be manufactured or offered for sale in this Territory, whether the same has been previously inspected or not before coming into the Territory, but once having been inspected in the Territory by a qualified Territorial inspector, or deputy, it can be shipped to any portion of the Territory without additional inspection.

SEC. 2. The inspector shall be ex-officio gauger of liquors used as burning fluids and oils and other liquids used for such purposes.

SEC. 3. The Inspector shall hold his office for the term of two years, and shall have power to appoint deputies, for whom he shall be responsible and accountable.

SEC. 4. The Inspector shall give bond with good and sufficient sureties in the sum of five thousand dollars, to be approved by the secretary of the Territory.

SEC. 5. Every person appointed inspector or deputy shall, before he enters upon his duties of office, take an oath or affirmation to support the constitution of the United States, the organic act of the Territory of Oklahoma, and perform the duties of his office with fidelity.

SEC. 6. The Inspector shall keep a record of all illuminating or fluids inspected in a book to be furnished by the territory, which shall be open to the inspection of all parties or persons interested.

SEC. 7. The inspector shall be a competent and qualified person, and shall at his own expense provide himself with the necessary instruments for the testing or guaging or weighing the quality of any such illuminating oils or fluids, which said instruments shall be the standard instruments used for that purpose and shall test all oils as follows: First, the water cup shall have sufficient water in it to rise two-thirds up the side of the oil cup. Second, fill the oil cup with oil to be tested to within one-eighth of an inch of the top. Third, suspend the thermometer so the bulb is just under the surface of the oil. Fourth, use an alcohol lamp to heat the water bath, and before placing the light under the water bath cup, test the oil in the oil cup by bringing a lighted match in contact with the surface of the oil, and if it does not ignite, place the lamp under the water cup and slowly heat the oil, not slower than one degree of

the thermometer in a minute, nor faster than two degrees of the thermometer in a minute, moving a lighted match across the surface of the oil, at each degree the thermometer rises, not more than three-eights of an inch from the surface of the oil. If the oil should flash (that is, a little gas burn on the surface) and go out again, the degree indicated by the thermometer is the flash test of the oil. The flame moved across the surface of the oil should not exceed that of any ordinary match.

SEC. 8. All illuminating oils or fluids that flash when a well-lighted match is applied, at a less temperature than one hundred and twenty degrees Fahrenheit, shall be branded by the inspector "Rejected," and all such oils, that do not flash when thus tested shall be branded "Approved Standard Oil." If the fluid inspected has no flash test, then the specific gravity of the same thus, "Specific Gravity-o".

SEC. 9. If hereafter weight shall be established for ascertaining of the quantity, in place of guaging by gallons, then the inspector shall mark on the package inspected by him the gross weight in place of gallons.

The inspector shall in addition to the aforesaid, affix his brand on all packages, boxes or barrels by him found to contain fluids that have no fire test as aforesaid, with these words: "Highly Inflamable."

SEC. 10. Any dealer in, or manufacturer of, oils or fluids subject to inspection, who shall refuse to admit an inspector or his deputy upon his premises, so far as it may be necessary for the performance of his duties, shall be fined for each offense not less than one hundred dollars nor exceeding five hundred dollars.

SEC. 11. Any person, manufacturer or dealer who shall sell to any person whatever in this Territory any of the said illuminating oils or fluids before the same shall have been inspected by said public inspector of oils, shall be guilty of a misdemeanor, and on conviction be fined in any sum not exceeding three hundred dollars, and the oils and fluids if found to be rejected, be forfeited and sold and the proceeds go to the school fund of the county in which it is found.

SEC. 12. Any manufacturer or dealer in said illuminating oils or fluids, who shall, with intent to deceive or defraud, alter or erase the inspector's brand to indicate a different fire test, gravity or quantity than is found by the inspector, or shall use, with such intent, packages having any inspector's brand thereon, without having the contents actually inspected, shall on conviction be fined in any sum not exceeding fifty dollars for each offense.

SEC. 13. All prosecutions for fines and penalties under this section shall be by indictment, or information by the county attorney or attorney general of the Territory, and fines and penalties, when collected, shall be paid into the treasury of the county where the offense is committed.

SEC. 14. The inspector shall be entitled to demand and receive the following fees for this service, and no more: For each barrel inspected, fifteen cents; for each smaller package, ten cents.

SEC. 15. Any inspector of oils appointed under the provisions of this act who shall wilfully fail to comply with the provisions of this act as to the inspection of the oils and fluids herein named, and shall wilfully or negligently make any false grade, tests or brands of said oils and liquids shall be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the Territorial prison for a period not less than one year nor more than five years, and be fined in any sum not more than five hundred dollars.

SEC. 16. This act shall take effect and be in force from and after its passage and approval.

Approved March 8, 1895.

APPENDIX NO. 2.

Session Laws of Oklahoma, 1899, Page 186.

Section 1. That Section 7, of Chapter 36, of the Session Laws of Oklahoma Territory, of 1895, entitled, "An Act to Provide for the Public Inspector of Oils or Burning Fluids, and Prescribing His Duties," be, and the same is hereby amended to read as follows: Section 7. The Inspector shall be a competent and qualified person, and shall, at his own expense, provide himself with the necessary instruments for testing or gauging and weighing the quality of any such oils, which said instruments shall be a Tagliabue open-cup tester and a set of Baume hydrometers for liquids lighter than water. The flash test shall be made in the following manner: First. The water cup shall have sufficient water in it to fill said cup to within one-quarter of an inch of the top when the oil cup is in place; Second. The oil cup shall be filed with the oil to be tested to within one-eighth of an inch of the top, and the outside of the cup and the upper level edge of the same freed from oil by means of blotting paper. The surface of the oil in the cup shall then be freed from air bubbles; Third. The oil cup is then to be placed in the water cup and the thermometer so suspended that the bulb is just under the surface of the oil; Fourth. An alcohol lamp shall be used to heat the water cup, but before placing the lamp under the water cup, test the oil in the oil cup by bringing a lighted taper, hereinafter described, in contact with the surface of the oil, and if it does not flash place the lamp under the water cup and continue heating until the termometer registers 100 degrees Fahrenheit. The lighted taper is then applied so that the flames, but not the taper, come in contact with the surface o fthe oil. If the oil should flash (that is, a little gas burn on the surface) and go out again, the flash point of the oil is 100 degrees or less. If the oil does not flash, continue heating and appiying the taper as described at every rise of two degrees in the temperature as indicated by the thermomter until the oil flashes. The temperature at which the oil flashes is the flashing point of the oil and shall be expressed in terms of degrees Fahrenheit. The taper used for testing the flashing point may be made of wood, giving a clear flame, and shall be not more than one-sixteenth inch in diameter. No taper or match with sulphur on it shall be used. The weight or specific gravity shall be determined by a standard Baume hydrometer for liquids lighter than water, and the oil so tested shall be at a temperature of 60 degrees Fahrenheit.

Sec. 2. That Section 8 of said Chapter 36, of the Session Laws of Oklahoma, of 1895, be and the same is hereby amended to read as follows: Section 8. All illuminating fluids that flash under the conditions as prescribed in section one at a less temperature than

120 degrees Fahrenheit and have not a specific gravity of not less than 46 degrees Baume, that is, all oils which fail to stand both tests, shall be branded by the Inspector "Rejected," and all such oils that do not flash at a less temperature than 120 degrees Fahrenhit and which hav a specific gravity of not less than 46 degrees Baume, as determined above, shall be branded "Approved Standard Oil."

SEC. 3. That the Inspector shall not apply the flash test to gasoline or other inflammable fluids, but he shall and he is hereby required to determine the weight or specific gravity in the same manner as required by Section 1 of this Act to oils. All gasoline to be used in vapor stoves and gasoline lamps shall have a specific gravity of not less than 70 degrees Baume, and a temperature of 60 degrees Fahrenheit. The Inspector shall affix his brand on all packags, boxes or barrels by him found to contain fluids that have no fire test, as aforesaid, with these words, "Highly Inflammable," and the specific gravity found by him thus: "Specific Gravity....." And if the same shall have been by him found to have a specific gravity of not less than 70 degrees Baume, at a temperature of 60 degrees Fahrenheit, he shall mark the same, "Approved Standard Gasoline."

SEC. 4. Any person selling, or any employee or agent of any company or corporation, selling such oils, gasoline or other illuminating fluids in Oklahoma Territory who shall sell the same as "Approved Standard Oil" or "Approved Standard Gasoline," when in fact the same is not of that grade, as found by the Inspector of Oils, shall be deemed guilty of a misdemeanor and upon conviction punished by confinement in the county jail not more than one year and by fine not more than five hundred dollars. And any company or corporation who shall furnish in this Territory oils or gasoline for sale in this Territory of lower grades than that herein specified shall be subject to a fine of one thousand dollas, to be recovered in civil action brought in the name of the Territory, and it is hereby made the duty of any county attorney or the Attorney-General of the Territory, upon information furnished by the Inspector of Oils or any citizen of the Territory, to bring such action when the facts warrant.

SEC. 5. That Section 11, of Chapter 36, of the Session Laws of Oklahoma, A. D. 1895, entitled, "An Act to Provide for the Public Inspector of Oils or Burning Fluids and Prescribing His Duties," be and the same is hereby amended to read as follows: Section 11. Any person, manufacturer or dealer who shall sell to any person whatever in this Territory any of the said illuminating oils or fluids before the same shall have been inspected by said Public Inspector or Oils, or who shall sell or offer for sale any oils or illuminating fluids which have been marked "Rejected" by the Inspector, shall be guilty of a misdemeanor, and on conviction shall be fined in any sum not exceeding three hundred dollars, and the oils and fliuds, if found to be rejected, be forfeited and sold and the proceeds go to the school fund of the county in which it is found, and any Inspector who shall willfully or negligently pass any oil or gasoline and shall mark the same "Approved," or who shall mark any pack-

ages, boxes or barrels of oil or burning fliuds so as to indicate that the same is of, or above, the quality prescribed by this Act, when in fact said oil or burning fluid is not of the quality prescribed by this Act, shall be guilty of a misdemeanor, and upon conviction be punished by a fine not exceeding five hundred dollars, and the forfeiture of his office.

SEC. 6. That Sections 7, 8, 9 and 11, of Chapter 36, of the Session Laws of Oklahoma, A. D. 1895, entitled, "An Act to Provide for the Public Inspector of Oils or Burning Fluids, and Prescribing His Duties," be, and the same are hereby repealed.

SEC. 7. This Act shall go into effect and be in force from and after its approval.

Approved March 8th, 1899.

APPENDIX NO. 3.

WILSON'S REVISED STATUTES OF OKLAHOMA TERRITORY, 1903, PARAGRAPHS 4611 AND 4612, (OKLAHOMA TERRITORY CODE OF CIVIL PROCEEDURE, SECTIONS 413 AND 414.)

(4611) SEC. 413. When the death of one is caused by the wrongful act or ommission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or ommission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

(4612) SEC. 414. That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in section four hundred and thirteen of this chapter, is or has been at the time of his death in any other state or territory, or when, being a resident of this Territory, no personal representative is or has been appointed, the action provided in said section four hundred and thirteen may be brought by the widow, or where there is no widow, by the next of kin of such deceased.

DEC 14 1908
JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

WATERS-PIERCE OIL COMPANY,
Plaintiff in Error,

vs.

ALBERT B. DESKINS,
Defendant in Error.

October Term, 1908

No. 69

Brief of Defendant in Error

A. H. BUSTON,
Attorney for Defendant in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES

WATERS-PIERCE OIL COMPANY, *Plaintiff in Error,*	October Term, 1908
vs.	
ALBERT B. DESELMS, *Defendant in Error.*	No. 62

BRIEF OF DEFENDANT IN ERROR.

We have not, at this writing been favored with a copy of the brief of plaintiff in error and hence shall present the case independently thereof, but along the lines and somewhat in the order in which the plaintiff in error complained of the alleged errors of the trial court, in the Supreme Court of Oklahoma Territory.

The facts are so fully and clearly set forth in the Statement of Facts in the first part of the opinion of the Supreme Court of the Territory, and which appears on page 154 of the printed record, that we deem it unnecessary to repeat or amplify them here.

ARGUMENT.

While the first assignment of error is that the Supreme Court erred in affirming the action of the trial court in overruling the objection of the plaintiff in error to the introduction of any evidence under the petition, nothing was urged in that behalf in the argument below. No demurrer was lodged against it and as yet there has not been even a suggestion as to any particular defect therein, and we shall proceed to consider those matters which were urged as grounds for reversal below.

I.

SUFFICIENCY OF EVIDENCE.

1.—PROXIMATE CAUSE OF THE INJURY.

The negligence complained of need not be the only cause, or the most proximate cause, and negligence to be the proximate cause of an injury must be such that a person of ordinary caution and prudence would have foreseen that some injury would likely result therefrom, not that the specific injury would result. And the question of proximate cause, whenever there is any doubt, must always be submitted to the jury.

Bishop on Rights and Torts Sec. 450-455.
Baltimore R. R. Co. vs. Kemp, 61 Md. 74;
Terre Haute R. R. Co. vs. Buck 96 Ind. 346;
Scott vs. Hunter 46 Pa. St. 192;
Milwaukee R. R. Co. vs. Kellog, 94 U. S. 469-174;
Kansas City vs. Gilbert 65 Kans. 469;
The A. T. & S. F. R. R. Co. vs. Parry 67 Kans. 515.
Hays vs. Mich. Cent. R. R. Co. 111 U. S. 228.

Baltimore R. R. Co. vs. Kemp, 61 Md. 74, on page 86.

"Now, the question is, whether the production of a cancer, as the result of an injury received by the negligence of the

defendants, under the circumstances of this case, be too remote a consequence from such negligence, to form an element of damage to the plaintiff. If it be not, then clearly the court below committed no error in refusing the second prayer of the defendants.

"It is not simply because the relation of cause and effect may be somewhat involved in obscurity, and therefore difficult to trace, that the principle obtains that only the natural and proximate results of the wrongful act are to be regarded. It is only where there may be a more direct and immediate sufficient cause of the effect complained of, that the more remote cause will not be charged with the effect. If a given result can be directly traced to a particular cause, as the natural and proximate effect, why should not such effect be regarded by the law, even though such cause may not always, and under all condition of things produce like results * * * Hence the general rule is, that, in actions of tort like the present, the wrong doer is liable for all the direct injuries resulting from his wrongful act, and that too although the extent or special nature of the resulting injury could not with certainty have been foreseen or contemplated as the probable result of the act done * * * Whoever does an illegal act is answerable for all the consequences that ensue in the ordinary and natural course of events, though these consequences be immediately and directly brought about by the intervening agency of others."

Terre Haute vs. Buck, 96 Ind. 346.

"Where the result of an injury in such as might have been expected to occur in the ordinary or natural course of events, the wrong doer is not relieved from responsibility although there may have been some intervening agency contributing to the result."

Scott vs. Hunter, 46 Pa. St. 192.

"One who wantonly or negligently causes property to be exposed to danger, which he knew, or with ordinary forecast and prudence might have foreseen, is responsible for damages resulting therefrom, *though his act may not have been the most proximate cause.*"

Milwaukee R. R. Co. vs. Kellog, 94 U. S. 469.

"The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a ques-

tion of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact, attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may move by a force applied to the other end, that force being the proximate cause of the movement, or as in the off cited case of the squib thrown in the market place. The question always is: was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? * * * * In the nature of things there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of the jury to look at these succession of events or facts and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

Hayes vs. Mich. Cen. R. R. Co., 111 U. S. 228.

"Although the want of a fence was not the efficient cause, *causa causans*, of the injury yet if it was *causa sine qua non*, a cause which if it had not existed, the injury would not have taken place, the Company is liable, and that is a question of fact; and the evidence of the circumstances, showing negligence on the part of the defendant which may have been the legal cause of the injury to the plaintiff, should be submitted to the jury."

Kansas City vs. Gilbert, 65 Kans. 469, on page 473.

"If one puts a dangerous mechanical contrivance in the public highway—one liable to do harm if disarranged or meddled with—and some meddler does disarrange or set it in motion to the injury of another person, it is no answer to say that the one whose act proximately in point of time or physical volition caused the injury, was not the agent of the one who exposed the machine to the hazard of being meddled with. True, it was the act of the policeman in changing the position of the pendent wire so as to receive the electric current from the defectively insulated span wire above, that produced the in-

jury, but in law the responsible cause of the injury, or an equally responsible cause of it, was the negligent act of the city in allowing the wire to hang down, subject to the chances of being so moved about as to be made into a conductor of the electric current above."

The A. T. & S. F. R. R. Co. vs. Parry 67 Kans. 515.

"Negligence, to be the proximate cause of an injury, must be such that a person of ordinary caution and prudence would have foreseen that an injury would likely result therefrom; not that the specific injury would result, but an injury of some character."

Where there is no intervening efficient cause the original wrong must be considered as reaching to the effect and proximate to it.

Hays vs. Williams, 17 Colo., 465.
The G. R. Booth, 171 U. S. 450;
The Ontario, 37 Fed. 220;
R. R. Co. vs. Elliott, 55 Fed. 949.

Hays vs. Williams, 17 Colo. 465.

"What is the proximate cause of an injury, whether it be the original negligence of one party or the intermediate negligence of another party, is ordinarily a question of fact for the jury to be determined from the minor associated facts and circumstances."

The G. R. Booth, 171 U. S. 450, on page 457, by Mr. Justice Gray:

"The question is not what cause was nearest in time or place to the catastrophe. That is not the meaning of the maxim *causa proxima non remota spectatur*. The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result."

The Ontario, 37 Fed. 220.

"Where a vessel was negligently run ashore, and a storm coming on, was scuttled to save her from total loss held, that

the negligent stranding, and not the storm, was the proximate cause of the loss."

The Chicago etc., vs. Elliott, 55 Fed. 949.

"The true rule is, that the injury must be the natural and probable consequence of the negligence, such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrong doer as likely to flow from the act."

Applying these propositions of law to the facts in this case—those facts which are directly proven, and those facts which must naturally and necessarily be inferred from those proven, we submit that the proximate cause of the injuries resulting in the death of the children of the plaintiff was the negligent, careless and wanton putting upon the market, by the plaintiff in error, this highly dangerous and death dealing mixture. The proof here does not warrant the imputation that there is a presumption founded upon a presumption. In the first place the mixture of the coal oil and gasoline is admitted, and in the second place it is admitted that this mixture was knowingly placed upon the market, and three barrels of the same sold to the firm of Powers & Deselms with the representation that it had been tested and approved by the inspector of Oils, and the fees for such inspection charged to the retail dealers. And it is proved that the Oil Company, by an inference that arises to a presumption that cannot be rebutted, knew of the dangerous quality of this mixture by the letter from the Home office to the Guthrie agent to "take the chances" and sell the mixture. It is proved that the plaintiff took a gallon of the mixture to his home, and that it was there in the house at the time the injuries occurred; that the fire in the heating stove had gone out the night before and had not been re-kindled (Printed Record page 44); that there was no fire or coals in the stove the next morning prior to the tragedy. (Printed Record page 45). That the first person to reach the fire found the house so full of smoke, gas and vapor, that he was driven therefrom immediately when he sought to enter (Printed Record page 49); this is proof positive that

there must have been an explosion (See Prof. Holter's testimony, record page 72); and the broken stove door tells the same tale. Must it not be said that this result was such as might have been expected to occur in the ordinary and natural course of events? Should not a person of ordinary caution and prudence have foreseen that an injury would likely result? But the disposition on the part of the agents of the Oil Company to "take chances" induced them to throw "caution" to the winds, and to forget "prudence" entirely. Why should any chances have been taken? It was merely a question of dollars and cents to the Oil Company, but of life and death to its customers. Counsel for plaintiff in error, in their brief below, concede, that "if it be said that the inmates of the house were unable to escape and were destroyed in the conflagration, that the origin of the fire must have been so sudden as to cut off the possibility of self preservation, that this result could have been consummated only by some highly inflammable substance, there being such an inflammable substance present on the premises in the shape of the oil and direct indications pointing to the fact that the receptacle had been transported from the place where usually kept to the immediate scene of the fire, that there might be sufficient facts and circumstances from which an inference could be fairly drawn that the oil in question was involved in the conflagration at its inception or soon afterwards." When we add to these suggestions the fact of the broken stove door, the suffocating gas, the rent oil can and the dead bodies, then what counsel denominates a "fair inference," becomes practically a certainty. But counsel contended below that even if these circumstances do show that this oil was involved in the origin of the fire, three legal phases of the situation might be possible under the proof.

1. That the oil was carefully handled by the deceased and it accidentally caught fire, under the circumstances wherein any good oil would have done the same thing.

2. That it might have been carefully handled by the deceased, Mrs. Deselms, and took fire under circumstances at

tributable solely to the excessive gasoline, on account of its extra or enhanced inflammability.

3. That it was carelessly handled by the deceased and took fire under circumstances where any good oil would have behaved in the same manner or wherein the excessive inflammability concurring with the carelessness of the deceased produced the accident.

The 1st. so called phase is not possible, under the evidence, and the 3rd, is not possible under the law, as applied to the admitted facts in the case.

There is no fact or point of proof to sustain the 1st. phase. If there had been no explosive mixture, but only good coal oil of the standard required by law, there is no suggestion in the evidence that an explosion could possibly have occurred and an injury resulted, had it been carefully handled. This phase is certainly not an inference from a fact, nor even a presumption upon a presumption. To call it an *assumption* upon an *assumption*, with neither fact nor inference to support it, is all that can be said for it.

The presumption of the law is, that Mrs. Deselms was free from fault, and the burden of proving her contributory negligence rests on the defendant, but the defendant did not attempt to offer any such proof. Both of these propositions are supported by numerous authorities, some of which we shall cite later on in this brief. Thus by the process of exclusion, the 1st and 3rd phases of the situation, so denominated by counsel, must be eliminated, leaving only the 2nd. phase, which is the real situation supported by ample proof, and the presumption of law which destroys the 3rd.

The case of O'Neil vs. James, 101 N. W. 828, was an action by the employee of a saloon keeper against a person who sold champagne cider to his employer. While preparing to open one of the bottles, it burst and the plaintiff's eye was put out by the explosion. This was all of the evidence of negligence against the defendant. The court say:

"It was the claim of the defendant that the explosion, instead of being caused by an over-charge, might have been caused as follows: 1. The contact of the human hand with the cold bottle taken from the ice box, upon a small area of the cold glass, would have caused a sudden expansion of the small area of the glass, and consequent cracking of the bottle; 2. The warm air of the room might have caused the same result, independent of the hand; 2. The pressure brought to bear upon the bottle by inserting its neck into the socket of the corkscrew, or by striking the bottle on the corkscrew; 4. Perchance a cracked bottle from some other cause; or, 5, a bottle inherently weak by reason of varying thickness of glass, or the like. We think, with reference to the question of negligence the court was right in holding that, in view of the testimony upon this branch of the case, the issue should be submitted to the jury."

2.—CAUSE OF IGNITION UNKNOWN OR NO EYE WITNESSES TO INJURY.

The plaintiff in error has heretofore rested its claim for a reversal, principally upon the proposition that since there was no eye witnesses to the origin of the explosion and fire, that such origin must rest wholly in conjecture, and that therefore, the case must fail for want of proof.

This is, no doubt, the rule, when an injury occurs that cannot be accounted for, but it does not apply where there is room for balancing the probabilities and drawing reasonable inference which do account for the injury.

Schoepper vs. Chemical Co. 113 Mich. 582.
Gas Co. vs. Carter, 65 Kans. 565.
Seybolt vs. R. R. Co. 95 N. Y. 562.
Lutton vs. Vernon, 62 Conn. 1.
McBride vs. R. R. Co. 19 Oregon 64.
R. R. Co. vs. Freeman 48 U. S. App. 757.
Toledo etc. Co. vs. Chisholm 83 Fed. 652.
Stowell vs. Standard Oil Co. 102 N. W. 227.

Scheopper vs. Chemical Co., 113 Mich. 582:

"Defendant's counsel contend that the cause of this explosion is a matter of mere conjecture, and it is said by counsel that it is not enough for plaintiff to prove circumstances consistent with her theory, but that these circumstances, and each of them, must preclude any other rational conclusion. This we take to be but another way of stating the proposition that the proof must exclude all reasonable doubt. It is hardly necessary to say that no such rule obtains in civil cases. It is true that where any injury occurs that can not be accounted for, and where the occasion of it rests wholly in conjecture the case must fail for want of proof. But such cases are rare, and that rule should never be so extended as to result in the failure of justice, or in denying an injured person a right of action where there is room for balancing the probabilities and for drawing reasonable inferences better supported upon one side than the other. In this case there was no direct proof of any other probable producing cause of the explosion than such as was offered by the plaintiff. * * * It is true defendant's theory and expert testimony is opposed to that offered by the plaintiff. It is the peculiar province of the jury to weigh this testimony. * * * Negligence, like any other fact, may be inferred from circumstances. And, though the proof of plaintiff depended upon inferences to establish the main fact, the question of whether the inferences suggested by the plaintiff's theory is the correct one, or whether it was sufficiently rebutted, was for the jury. Crosby vs. R. R. Co. 58 Mich. 458; Hagan vs. R. R. Co. 86, Mich. 615; Woods vs. R. R. Co. 108 Mich. 396."

Gas Co. vs. Carter, 65 Kans. 565, on page 568, by Judge Pollock:

"It is argued by counsel for plaintiff in error that the proximate cause of the death of Carter was the ignition of the accumulated gas in the cellar, and not in permitting the gas to escape from the well and accumulate in the cellar, and in consequence of the admission made by counsel for plaintiff that the manner in which the gas became ignited was unknown, is the admission of the want of all knowledge and lack of proof upon a vital issue of fact, fatal to a recovery. * * To this contention we do not agree. It was employing for its profit a subtle and highly explosive agency. * * * Where an agent is controllable by care, attention, or science, he who re-

ceives the benefit must assume the responsibility. Unless contributory negligence is shown, it is wholly immaterial how the gas become ignited."

In the case at bar, the Oil Company was employing for its profit a highly explosive agency—and it must be remembered that an addition of five per cent gasoline to a quantity of coal oil increases the volatility, and consequently, the explosive character, of the mixture, to a much larger extent than the mere proportion of the gasoline to the coal oil. (Printed Record page 87.) This agent was controllable by the Oil Company, in fact it was gross negligence and criminal violation of law to place it upon the market at all, but having assumed to so market it for profit, it must now assume the responsibility for the injury which it has wrought.

Seybolt vs. R. R. Co. 95 N. Y. 562.

"While it is true as a general proposition that the burden of providing negligence on the part of the defendant occasioning an injury is on the plaintiff, yet when he has shown a situation which could not have been produced except by the operation of abnormal causes, the onus then rests upon the defendant to prove how the injury was caused."

Lutton vs. Vernon, 62 Conn. 1.

"Where one driving a wagon, on a dark night, on a highway thirty-two feet wide, apparently backed the wagon across the highway through a line of trees, over a sidewalk, and down a slope into a pond, between which and the highway there was no barrier, except a row of trees and he was found drowned in the pond, and no other circumstances of the accident appeared, it was held that it did not appear as a matter of law that the deceased had been guilty of contributory negligence."

McBride vs. R. R. Co. 19 Oregon 64.

"Where there is no direct evidence that the traveler did not stop, look and listen, before he entered upon a railroad crossing, the presumption of law is that he did his full duty and observed the precautions which it prescribed, there being no eye witnesses to the accident."

Toledo etc. Co. vs. Chisholm, 83 Fed. 652, on page 657.

"The case is somewhat peculiar, in that no one was an eye witness to the disaster; but facts were proven from which the jury were at liberty to infer what was the proximate cause of the accident, and whether the deceased exercised due care, and with the finding of the jury on these issues we are not at liberty to interfere."

Stowell vs. Standard Oil Co., 102 N. W. 227.

"It is true the plaintiff's case rested largely upon inferences to be drawn from the facts proved; but it often occurs that a case, meritorious in itself, cannot be otherwise established. In such case the law does not permit a failure of justice unless the case rests upon mere conjecture, which we think is not the case here."

In their brief below, counsel for plaintiff in error quoted the evidence of the witness Chauvenet, that a mixture of 5 per cent gasoline with 95 per cent coal oil, would make a safe oil to use as illuminating oil, and then proceed to argue as if this was an established fact in the case. But there was evidence in the case (see evidence of Mrs. Emory on page 43 of the printed record) that this very mixture, by the explosion of which the tragedy was caused, was not a safe oil to use in a lamp.

3.—QUESTION FOR JURY.

Referring again to the contention of counsel for plaintiff in error, that under the evidence in the case, various phases are presented, one that the dangerous mixture was the cause of the explosion and fire resulting in the injury and the others that the dangerous mixture was not involved in the origin of the explosion and fire, we have further to say that the determination of the question as to whether the injury resulted from a mere accident wherein no one was at fault, or was caused by the negligence of the party injured

or whether it is attributable to the dangerous mixture, is a matter for the jury.

Pittman vs. City of El Reno, 2 Okla. 414.
Ruch vs. Gas Electric Co., 65 N. J. L. 399;
N. Y. etc. R. R. Co. vs. New Jersey 60, N. J. L. 52;
R. R. Co. vs. Middleton, 57 N. J. L. 154;
Malnken vs. Freeholder, 41 Atl. 921;
Schoepper vs. Chemical Co. 113 Mich. 582;
Toledo R. R. Co. vs. Chisholm, 83 Fed. 1652;
Texas C. R. R. Co. vs. Gentry, 163 U. S. 353;
Burns vs. Chicago etc. R. R. Co., 69 Iowa 450.

Pittman vs. City of El Reno, 2 Okla., 414.

"Where from the evidence it is at all doubtful as to whether contributory negligence is established thereby, it is not for the court to find as a matter of law that such contributory negligence was made out, but the question should be submitted to the jury."

Ruch vs. Gas Electric Co., 65 N. J. L. 399.

"Whether the striking of a match by the plaintiff to discover where the smell of gas, which he detects, comes from, is negligence which contributes to the injury resulting from an explosion caused thereby, will depend upon the circumstances of the case, and is a question for the jury."

In the present case there is no evidence that any of the persons injured were guilty of contributory negligence, unless the suggestion of counsel, that the use of coal oil to light a fire is such contributory negligence, but that as well as all the other facts and circumstances in the case is a matter for the jury, and the jury must say whether there is any contributory negligence or not, and the jury having found that there was not, that is conclusive upon the plaintiff in error. The finding of the jury is abundantly supported by the evidence, Mrs. Emory testifies that the night previous to the accident the fire had gone out in the stove, so that they were compelled to go to bed on account of the cold (Printed Record page 44.) On the next morning, Mrs. Emory testifies that she started to

make a fire in this stove and opened it and shook down the ashes, and that there was no fire or live coals in the stove at that time, but that the stove was cold (Printed Record page 45). The condition in which the stove was found after the fire corroborates this testimony, because the kindling and paper which were in the stove and which evidently had been put there for the purpose of starting a fire, were found only slightly scorched, which was plainly the result of the explosion at the time the match was applied to the kindling, the burning gases formed by the accident being blown out of the top and door of the stove like a discharge from a gun. (Printed Record pages 30 and 31.) It is evident from the paper found in the stove that there could have been no fire in it or it must have been burned.

N. Y. etc. R. R. Co. vs. New Jersey, 60 N. J. L. 52.

"Question of dispute of matters of fact relating to the negligence of the one party and the contributory negligence of the other, are properly submitted to the jury."

R. R. Co. vs. Middleton, 57 N. J. L. 154.

"No presumption of negligence in the decedent arises in any action from the mere occurence of the accident. The facts and circumstances, as a basis for a non suit, must be of such probative force, in the evidence of the plaintiff, that contributory negligence so conclusively appears as to exclude any other legitimate inference or conclusion. The facts and circumstances, where they are of doubtful import, and difficulty arises as to the solution of the question whether contributory negligence exists or not, are for the consideration and determination of the jury."

Mainken vs. Freeholder, 41 Atl. 921.

"Upon a motion to non suit on the ground of contributory negligence, where the alleged negligence must be deduced from facts and circumstances in evidence, the question is usually one for the jury."

Schoepper vs. Chemical Co., 113 Mich. 582.

"Whether the inference suggested by plaintiff's theory as to the cause of an explosion of nitroglycerine, whereby her in-

testate had been killed, was a correct one, or whether it was sufficiently rebutted, is a question for the jury."

Texas C. R. R. vs. Gentry, 163 U. S. 353.

"Where a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury."

Burns vs. Chicago etc. R. R. Co. 69 Iowa 450.

"Where the plaintiff's intestate, when last seen alive, was performing his duty in setting the brakes on a car which he was riding, and a minute later, the train having separated at the first coupling in front of him, he was thrown to the ground, run over and killed and there was no other evidence bearing on the question of his negligence. It was held that the question was for the jury."

4.—USING COAL OIL TO KINDLE FIRES.

The proof in this case is to the effect that it is not dangerous to use ordinary coal oil, or such oil as may be safely used for illuminating purposes, to kindle fires under the conditions as proven in this case. (Testimony of Prof. Holter Printed Record page 73.) (Testimony of Prof. Ringer, Printed Record page 90.) Of course if there is fire in the stove or hot coals, and the stove is hot, there would be danger, but there is direct proof that such were not the conditions here, that on the contrary there was no fire, no coals, and the stove was cold (Testimony of Mrs. Emory record pages 44, 45, 46, 47.)

It cannot be said as a proposition of law that the use of coal oil to kindle fires is contributory negligence.

Ives vs. Weldon, 114 Iowa 476;
Riggs vs. Standard Oil Co., 130 Fed. 199-204.
Ellis vs. Republic Oil Co., 133 Iowa 11.

Ives vs. Welton, 114 Iowa 476.

"In an action to recover damages for injuries sustained by a young daughter of the purchaser of gasoline, who was

burned by the explosion of the gasoline which she used for starting the fire, supposing it to be kerosene, it was held that the failure of the seller to label the kerosene as required by law was negligence *per se.*"

Riggs vs. Standard Oil Company, 130 Fed. 199-204.

"Now, there has been testimony introduced from witnesses on the part of the defendant, or from the cross-examination of the defendants witnesses, that it is customary with some men to make fires with the use of kerosene by pouring it upon the kindling to light the fire. It is very possible that this may be done with entire safety if there are no coals or fire in the stove; by putting the wood and kindling in the stove and pouring oil upon it, putting the oil can away, and then applying a match to it."

Ellis vs. Republic Oil Company, 133 Iowa 20:

"The use of kerosene in kindling fires is too common and too well known for us to say that a person using reasonable care may not employ that agency without being chargeable with negligence. It is said in argument that this may be true, and yet the court should hold it negligence to pour oil directly from the can into a stove, in which there is, or may be, fire, But it is not conceded nor is it shown beyond question that such was the manner of the accident."

5.—PASSING THROUGH INTERVENING HANDS, AND WANT OF CONTRACTUAL RELATION BETWEEN THE PARTIES.

A person who places on the market for general use a dangerous explosive which he represents and sells as a safe illuminant, is liable for any damages caused by such substance either in the hands of his immediate vendee or a remote purchaser. And the rule that a seller of an article of commerce not in itself dangerous, is not responsible for consequences to the purchaser of his vendee resulting from defects in the articles sold, does not apply in this case.

Elkins Bly & Co. vs. McKean, 79 Pa. St. 493.

Judson vs. Giant Powder Co., 107 Cal. 549.

Wellington vs. Oil Co., 104 Mass. 64.

Rose vs. Stevens etc. Co., 11 Fed. 438.

Stowell vs. Standard Oil Co., 102 N. W. 227.
Clement vs. Crosby, 111 N. W. 745.
Thomas vs. Winchester, 2 Seld. 397.

Elkins Bly & Co. vs. McKean, 79 Pa. St. 493.

"The substance of the 4th assignment of error is, that after the oil had passed from the defendants in large quantities to Arbuckle & Co., and from them in smaller quantities to Caskey, and from Caskey to Steele and Heart, who sold a lamp full to McKean, there can be no recovery. The argument in support of this point is founded upon the alleged successive intervening liability of the persons through whose hands the oil had passed. But this proposition is unsound as a legal defense. The number of hands through which the oil had passed might furnish a strong argument on the question of identity, and the guilty knowledge of Elkins, Bly & Co., as to this particular oil, but could not constitute a legal bar to recovery, if the identity of the oil and the guilty knowledge were made clear. Certainly one who knowingly makes and puts on the market for domestic and other use, such a death dealing fluid, cannot claim exemption from liability for his terrible wrong, because he has sent it through many hands. The length of its passage may create a doubt of its identity, or that it was sent on its mission of destruction with a full purpose and knowledge of its dangerous qualities, but the facts being established, he cannot escape the consequences of his crime against society. The maxim *qui facit per alium, facit per se*, who does by another does by himself, applies as clearly as the other maxim *sic utere tue ut alienum non laedas*, so use your own that you will not injure another. * * * A manufacturer who sells his products as an illuminating oil bearing the high and safe fire test of 110 degrees, when in fact he knows that its fire test will not exceed 64 or 65 degrees Fahrenheit, and that it is a most explosive and unsafe oil for domestic use, can plead nothing in defense of its wilfull, terrible wrong done to a confiding community. He bears within him a heart regardless of social duty, evidencing malice in its legal sense in a high degree."

Judson vs. Giant Powder Co., 107 Cal. 549.

"In addition to the fact of the explosion being established, the respondent offered expert testimony to the effect that if the factory was properly conducted, and the employees careful

during the process of manufacturing, an explosion would not occur. For the present we lay aside the evidence of the experts, and meet squarely and directly the question presented: Does the proof of the explosion draw with it a presumption of negligence sufficient to establish a prima facie case for the recovery? While the cases are not in entire accord in holding that a presumption of negligence arises from the fact of the explosion, still they largely preponderate upon that side, and we think that but few well considered cases can be found looking the other way. All courts agree that, where contractual relations exist between the parties, as in cases of common carriers, proof of the accident carries with it the presumption of negligence, and make a prima facie case. This proposition is elementary and uncontradicted. Therefore the citation of authority is unnecessary, yet we know of no sound reason, and have found none stated in the books, why this principle of presumption should be applicable to cases involving contractual relations and inapplicable to cases where no contractional relations exist. It is intimated in some Indiana case that the presumption arises upon proof of the accident by reason of the carrier's contract to safely deliver the passenger at his destination. But there is no such contract. The carrier is not an insurer of his passenger. If he were, this presumption of negligence arising from the accident, aside from the act of God, would be conclusive and irrebuttable; but such is not the fact, for it is only prima facie and always disputable. As was well said by the court in Rose vs. Stevens etc. 11 Fed. 438: Undoubtedly the presumption has been more frequently applied in cases of carriers of passengers than in any other class, but there is no foundation, no authority, or any reason for any such limitation of the rule of evidence. A presumption originates from the nature of the act, not from the nature of the relation between the parties. The carrier's contract with his passenger is simply to exercise a degree of care in his transportation. It is a duty which the law enjoins upon him; but the law also enjoins the duty upon this appellant and all others, in the conduct of their business to exercise a certain degree of care towards this respondent and all mankind. * * * When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management, use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that

the accident arose from a want of care. Tested by this rule, no question of contractual relation could ever form an element in the case."

Wellington vs. Oil Co., 104 Mass. 64.

"Proof of the facts thus alleged would show that the defendants were guilty of a violation of duty in selling an article which they knew to be explosive and dangerous, for the purpose of being re-sold in the market without giving information of its nature, and were therefore bound to contemplate, as a natural and probable consequence of their unlawful act, that it might explode or ignite and injure an innocent purchaser or his property, and to answer any damages for such a consequence if it should come to pass. * * * It is well settled that a man who sells an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result therefrom, to that person or any other who is not himself in fault."

Rose vs. Stevens etc. Co., 11 Fed. 438.

"Negligence may be inferred from the fact of the explosion of a boiler, whether there be any relation between the owner of the boiler and the party injured or not. The presumption originates from the nature of the act, and not from the nature of the relation between the parties."

Stowell vs. Standard Oil Co., 102 N. W. 227.

"The rule contended for by defendant's counsel that a seller of an article of commerce not in itself dangerous is not responsible for consequences to a purchaser from his vendee resulting from defects in the article sold, which defects were unknown to the original seller, is supported by abundant and convincing authority and has recently been affirmed by this court. Does the present case fall within the principle of these cases? The statute provides for an inspection of kerosene oil, and makes it lawful to sell approved inspected oil. It also renders it unlawful to sell rejected or condemned oil. The act also makes it an offense for any person to sell or attempt to sell any illuminating oils, whether manufactured in this state or not, before having the same inspected as provided in this act. This statute was evidently enacted not alone for the pro-

tection of a direct purchaser of illumniating oil, but for the benefit of the consumer as well. The commission of an act specifically forbidden by law, or the omission or failure to perform any duties specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury. A well recognized exception to the rule of non-liability to a remote purchaser, exists in case of a sale of an article dangerous in itself. The Legislature of this state (Mich.) has recognized and treated illuminating oil not tested and shown to be non-igniting at the temperature of less than 121 degrees, as a dangerous substance, and one who sells it without inspection brings himself within the principle of this exception to the general rule."

Thomas vs. Winchester, 2 Seld. 397, quoted with approval in Savings Bank vs. Ward, 100 U. S. 204:

"Pharmacists or apothecaries who compound or sell medicines, if they carelessly label a poison as a harmless medicine, and send it so labelled into the market, are liable to all persons who, without fault on their part, are injured by using it as such medicine, in consequence of the false label; the rule being that the liability in such a case arises not out of any contract or direct privity between the wrong-doer and the person injured, but out of the duty which the law imposes on him to avoid acts in their nature dangerous to the lives of others."

Clement vs. Crosby & Co., 111 N. W. 745.

"A manufacturer who knowingly makes and puts upon the market, without notice, a highly dangerous article which does not contain intrinsic evidence of its character, is liable to one injured while attempting to use it, notwithstanding it was purchased from a merchant who knew of its dangerous nature and sold it without warning."

It will be observed, that even before the mixture of gasoline with this oil, it had been rejected by the Territorial Oil Inspector, (Printed Record page 106), yet notwithstanding such rejection, and notwithstanding the infusion of the gasoline which made a mixture that flashed at a temperature of less than 60 degrees in a closed cup tester, or a temperature of less than 80 degrees in an open cup tester; (Printed Record page 67), the oil Company "took chances" and sent its mixture on its mission of death and destruction.

Morrison vs. Lee, 113 N. W. 1025.

"In this case the Supreme Court of North Dakota cites with approval the opinion of the Supreme Court of the Territory of Oklahoma in the case at bar, using the following language:

" * * * the only evidence as to the cause of the fire negatived the idea that the explosion occurred while the oil was being poured from the can into the fire. The evidence showed that there was no fire whatever in the stove when a witness who testified on the trial left the house at 8 o'clock in the morning. * * * The evidence indicated that there was an explosion either in the stove from lighting the kindling after the oil had been placed thereon, or from the mixture of air and gasoline vapor in the room. There being no direct or circumstantial evidence showing that the can exploded while the oil was being poured out of it into the fire, and the circumstances indicating the contrary, the court, on the question of negligence, very properly gave the injured party the benefit of the presumption of due care prompted by the instinct of self preservation."

6.—CONTRIBUTORY NEGLIGENCE, BURDEN OF PROOF.

The burden of proving contributory negligence rests on the defendant, and it will not save the defendant, unless it has been established by a preponderance of the evidence.

R. R. Co. vs. Horst, 93 U. S. 291;
Hough vs. R. R. Co., 100 U. S. 213;
R. R. Co. vs. Gladman, 15 Wall, 401;
R. R. Co. vs. Harmon, 147 U. S. 571;
R. R. Co. vs. Phillbert, 25 Kans. 583;
R. R. Co. vs. McCally, 41 Kans. 639.

There being no evidence offered by the defendant tending or attempting to prove contributory negligence upon the part of the deceased, and no evidence on the part of the plaintiff which would warrant the court in holding as a matter of law that the deceased was guilty of contributory negligence, the general finding of the jury that there was no contributory negligence, is conclusive.

7.—PRESUMPTION THAT INJURED PARTY IS FREE FROM FAULT.

The law presumes that a person injured is free from fault, in the absence of eye witnesses, or evidence to the contrary.

Dallemand vs. Saalfeldt, 175 Ill. 310;
Chicago R. R. Co. vs. Gunderson, 174 Ill. 495;
Salyers vs. Manon, 104 Iowa 74;
R. R. Co. vs. Aderhold, 58 Kans. 293-298;
Wyunning vs. R. R. Co., 64 Mich. 93;
R. R. Co. vs. Gentry, 163 U. S. 353.

8.—NEGLIGENCE OF PARENT WILL NOT BE IMPUTED TO CHILD.

It is a well settled rule of law supported by numerous modern decisions that the negligence of the parent cannot be imputed to the child.

Wymore vs. Mahaska, 78 Iowa 396;
Bradshaw vs. Frazier, 85 N. W. 752;
R. R. Co. vs. Snyder, 18 Ohio St. 399;
Hough vs. Ames, 16 Nebr. 139;
Rushing Co. vs. Moore, 59 Texas 64;
R. R. Co. vs. Schuester, 113 Pa. St. 412;
Robinson vs. Cone, 22 Vt. 213;
Daley vs. R. R. Co., 26 Conn. 591;
Boland vs. R. R. Co., 26 Mo. 591;

If, notwithstanding the verdict of the jury and the legal presumption, there still be a shadow of doubt as to whether Mrs. Deselms was guilty of contributory negligence or not in using coal oil to kindle a fire, still, in view of the authorities quoted under this sub-head, her negligence could not be imputed to her children who were destroyed, nor to the plaintiff in this action.

II.

ADMISSION OF EVIDENCE.

1. The first error heretofore complained of under this head is the admission of letters from Wagnon, assistant manager of the defendant, to Carter, its agent in Guthrie. (Printed Record page 22.)

The ground of complaint is, that the contents of this letter were fully covered by the admission, and that the letter itself only served as an inflammatory text to the jury. We call the attention of the court to the fact that the inflammable matter, both in this text, and in the mixture that destroyed these children, originated entirely with the defendant itself, and it comes with poor grace from this defendant to call a halt on its inflammable matter, for the first time, only after the destruction of this family, and when it is brought before a jury to answer therefor.

If as contended by the defendant, the admission covered the entire matter contained in the letter, then the admission of the letter could not have prejudiced the defendant; and if the admission did not entirely cover the contents of the letter, then the plaintiff was entitled to its contents. In neither event did the court err in admitting the letter.

We think however, that the admission was not the full equivalent of the contents of the letter. The admission only goes to the length of admitting that the oil and gasoline had been mixed, and that with knowledge of the mixture, the defendant sold it; the expression in the letter to "take chances," shows a knowledge on the part of the defendant that the mixture was dangerous, for if it was not dangerous, what chances would there have been to take?

2. The only other complaint under this head, is the admission of the testimony of Prof. Ringer, as to his experience in using coal oil for kindling fires. Prof. Ringer was introduced as an expert witness upon the qualities of petroleum

and its products, and in order to qualify him as such expert, he was allowed to testify as to his experience in the handling of oils, in order that the court might find that he was qualified as an expert. He testified properly to a fact which we had a right to prove, and of which the defendant makes no complaint, that is, that it is not dangerous to use coal oil for kindling fires under certain conditions, and certainly it was proper for him to show the facts on which he based such testimony.

This testimony, it is plain, was not introduced to establish a custom or usage, and could not have been so considered.

III.

INSTRUCTIONS TO THE JURY.

1.—INSTRUCTION NUMBER FOUR.

Counsel complain of instruction number 4, (Printed Record page 139) as given to the jury by the trial court, because it recites the requirements of the Inspection Law of Oklahoma as to the qualities of oils that may be placed upon the market. And it is urged that this law is void, or that the second section of the Act is void, because, as counsel say, it is unintelligible. We cannot agree that this section is void because unintelligible, or for any other reason. It may be true that the language employed is not the most appropriate to express the meaning of the Legislature, but when it is fairly considered, there can be no doubt as to its meaning. The use of the double negative, in the expression,—"and have *not* a specific gravity of *not* less than 46 degrees Baume,—" may be somewhat confusing upon a first reading, but when we apply the grammatical rule, that a double negative makes an affirmative this part of the statute would read—"and have a specific gravity of less than 46 degrees Baume." Then the section would plainly mean, that all oils that have a *less* specific gravity than 46 degrees Baume, shall be rejected, and all oils that

have a specific gravity of *not less* than 46 degrees Baume, shall be approved. Now, bearing in mind that the Baume scale for liquids lighter than water, is an inverse scale, it follows that a specific gravity of less than 46 degrees Baume would be 47 or any other higher number, which would show a lighter, more volatile, and consequently more dangerous oil, which is prohibited by the statute.

The specific gravity test is the only test that can be applied to gasoline, because it is so light and volatile that it will flash at zero, and hence the flash test cannot be applied to it, and Section 3 of the Act requires that gasoline shall have a specific gravity of not less than 70 degrees Baume, and Mr. Robinson testifies, record page 217, that gasoline with a specific gravity of 87 degrees is so volatile that it is not a standard product used for ordinary purposes, and thus we see that the higher in *number*, on this Baume scale, the lighter is the *specific gravity*, and "not *less* than 46 degrees Baume" actually means not *more* than 46 degrees in *number* on the Baume scale.

The clear intent of the Legislature was to exclude the lighter and more dangerous illuminants, and to admit the heavier and safer ones, and the obscruity in the meaning of the Act which the plaintiff contends for in his brief, arises from confusing actual specific gravity, with the inverse scale of the Baume hydrometer.

It may be that the inspectors have mis-applied the rule for ascertaining the specific gravity of these oils, and they may have failed to take into consideration the fact that the Baume scale is inverse, and thereby have rejected fluids of sufficient specific gravity, but this does not militate against the law.

This was a rightful subject of legislation and the Legislature had full authority to enact it as a police regulation, for the protection of the people.

It is said in the case of Patterson vs. Kentucky, 97 U. S.

501, in a decision upholding the oil inspection law of Kentucky:

"By the settled doctrine of this court, the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights. * * * The Kentucky statute under examination manifestly belongs to this class of legislation. It is in the best sense, a mere police regulation, deemed essential for the protection of the lives and property of citizens." In the case of Oats vs. The Bank, 100 U. S. 239, Mr. Justice Harlan delivering the unanimous opinion of the court, uses the following language:

"The duty of the court, being satisfied of the intention of the Legislature clearly expressed in a constitutional enactment is to give effect to that intention, and not to defeat it by adhering too rigidly to the mere letter of the statute, or to technical rules of construction; and we should discard any construction that would lead to absurd consequences. We ought, rather, to be curious and subtle to invent reasons and means to carry out a clear intent of the law-making power when thus expressed."

It is said in Shellabarger vs. Commissioners, 50 Kan. 141:

"Where it reasonably appears what was the intent of the Legislature, the statute will be construed so as to effect that intent, although contrary to the letter of the statute. * * * Statutes should be construed with a view to the original intent and meaning of the makers, and such construction should be put upon them as best to answer that intention, which may be collected from the cause or the necessity of making the act * * * and, when discovered, ought to be followed, although such construction may seem to be contrary to the letter of the statute."

From First Kent's Com., page 461, we quote the following:

"In the exposition of a statute, the intention of the law maker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit the intention is to be collected from the context; from the occasion and necessity of the law; from the mischief felt, and the remedy in view; and the intention is taken or presumed according to what is consonant with reason and good discretion."

In Sutherland on Statutory Construction, Sec. 260 appears the following:

"Where one word has been erroneously used for another, or a word omitted, and the context affords a means of correction, the proper word will be deemed substituted or supplied. This is but making the strict letter of the statute yield to the obvious intent."

Counsel further contended that this section of the statute is unconstitutional, because, as he alleges, the specific gravity test is useless and does not assist in determining the quality of oils, and he bases this contention upon the testimony of the witness Robinson, who is not a chemist nor a scientific man at all. He is an employee of the Standard Oil Company, whose cross-examination, as it appears in the record commencing on page 125, discloses a disposition to swear to anything that may help the Oil Company rather than any particular regard for the truth.

While this witness, did testify in his direct examination that the specific gravity test was useless, yet in his cross-examination on page 126 of the printed record, appears the following:

Question. Now, would the mixing of ten per cent lubricating oil with ninety per cent of illuminating oil, effect the illuminating oil in any way?

Answer. Very seriously.

Q. Would that change the specific gravity?

A. It would change the specific gravity and would also change the viscosity so materially that the oil wouldn't flow up the wick.

Q. Would five per cent of lubricating oil change the quality of burning oil?

A. Yes, sir.

Q. Could that be discovered by applying the test of specific gravity?

A. It would be discovered primarily by taking the color of the oil.

Q. I did not ask you how else you might, answer my question.

A. It can be, yes, sir.

Q. So then the specific gravity would be one of the tests that would discover that impurity in the oil, would it not?

A. It would be one of them, yes, sir.

Mr. William M. Chauvenet, the expert chemist from St. Louis, introduced by the defendant, of twenty-five years' experience in analyzing and handling oils, made the following answer to the last question asked him. (Printed Record page 115.):

Q. Taken in connection with the flash test, however, it (the specific gravity test) helps to exclude bad oils?

A. I think it does, I approve it being there for that purpose.

The plaintiff in error urges that the court should declare this statute unconstitutional, because the specific gravity test is useless in inspecting oils, and he bases his argument upon the evasive, unsatisfactory contradictory and contradicted testimony of Robinson. His scientific witness, Prof. Chauvenet, approves the gravity test, and thus upholds the law, and if the court can consider evidence in determining the constitutionality of an act, whose evidence will it follow, Robinson or Chauvenet?

But the court cannot hear proof or consider extrinic evidence in determining such a question.

In Kemmler vs. Durston, 119 N. Y. 569, the court say:

"Courts have no power to take proof as to the constitutionality of a statute, and extraneous testimony, either of experts or other witnesses, is not admissible to show that, in carrying it out, some provision of the constitution may be violated. If it cannot be made to appear that the statute is unconstitutional by argument deduced from the language of the law itself, or from matter of which the court can take judicial notice, it must stand."

It is evident from this Act, that the Legislature has taken the same view of this question as Prof. Chauvenet, that the specific gravity test taken in connection with the flash test, is a wise method for the inspection of oils. And the Court would not if it could, overthrow the law on the testimony of Mr. Robinson.

Courts are reluctant to consider the question of the constitutionality of a statute, and all reasonable doubts must be resolved in favor of its constitutionality.

Henderson vs. Robinson, 76 Iowa, 603;
State vs. Hope, 100 Mo. 347;
Bush vs. Indianapolis, 120 Ind. 476;
Bingham vs. Burmingham, 103 Mo. 345.

In Cooley on Constitutional Limitation, 7 Ed., it is said:

"That the courts will not declare laws void because solely of an unjust provision—232 sub-division 4; nor because in violation of fundamental principles, 237, subdivision 5; nor because conflicting with the spirit of the Constitution, 239 subdivision 6."

Again, counsel for plaintiff in error advanced the proposition that because the latter part of Section 4 provides a punishment for corporations but not for individuals, for doing the same thing, that the whole act is rendered void. This part of Section 4 was not referred to in the instructions, and has nothing to do with this case. This is not an action for the penalty therein prescribed, and we might concede for the sake of argument that this particular part of Section 4 is inoperative, yet that cannot carry down with it and render void the whole of Section 4, much less the entire act.

"Where a part of a statute is unconstitutional, but the remainder is valid, the parts will be separated, if possible, and that which is constitutional will be sustained. The constitutional and the unconstitutional may have been contained in the same section, yet all perfectly distinct and separable, so that the former may stand although the latter fall."

Presser vs. Illinois, 116 U. S. 252;
People vs. Kenney, 96 N. Y. 295;
Black's Constitutional Law, Sec. 35;
Cooley on Constitutional Limitations, 7 Ed. page 246

2.—INSTRUCTIONS NUMBER FIVE, SIX AND SEVEN.

Printed Record pages 139-140.

The plaintiff in error complains of these three instructions because of expressions therein as to uses of coal oil, and particularly to instruction seven, wherein the jury is charged that they must determine whether or not the use of coal oil to kindle fire was a usage so general and universal as to be a part of the general knowledge and experience of persons of average intelligence. We do not think there is anything in these instructions that could possibly prejudice the rights of the defendant. If there be any error in them at all, it was prejudicial to the plaintiff and in favor of the defendant.

Under the evidence, and the authorities heretofore cited and quoted from in this brief, we have shown that it is not dangerous to use coal oil to kindle a fire, under the conditions in which it was used in this case, and the defendant cannot be exempted from its liability to persons injured by its negligent act, by reason of any safe use to which the injured person may have put the oil, whether that use amounted to a general usage and custom, or not. And it was imposing an additional burden upon the plaintiff, not warranted by the law, to charge the jury that they must first find that the use of coal oil to kindle a fire was a universal usage or custom before a recovery could be had, but this as we have said, could only help, and could not possibly prejudice the defendant.

But upon the abstract proposition of law complained of, the charge is not open to the criticism made by counsel. Out of an abundance of caution, the plaintiff offered to prove that the use of coal oil to kindle a fire was a general usage in this country, but the court excluded it upon the ground that matters of common knowledge and experience were not necessary to be proved at all (Record page 74.)

This rule was doubtless correct.

In the case of Milwaukee & St. Paul R. R. Co. vs. Kellog, 94 U. S. 469 Lawyers Ed. 256, it is said:

"The subject of proposed inquiry was a matter of common observation, upon which the lay, or uneducated mind is capable of forming a judgment. In regard to such matters experts are not permitted to state their conclusions. In questions of science their opinions are received, for in such questions scientific men have superior knowledge and generally think alike. Not so in matters of common knowledge."

Again, this was a matter of such common knowledge, that the court might properly have taken judicial notice of it, without submitting it to the jury at all, but that he did so, could not possibly prejudice the defendant, but was to its advantage.

In Brown vs. Piper, 91 U. S. 37, the court say:

"Courts will take notice of whatever is generally known within the limits of their jurisdiction: State vs. Hays, 78 Mo. 318, Will notice coal oil is inflammable: Grimes vs. Eddy, 126 Mo. 180, will notice Texas fever and its communication to cattle: The Eureka Co. vs. Gazette, 35 Fed. 571, Will notice the meaning of cider; its manufacture and constituents."

In Sanford vs. Gates, 38 Kansas 405, the court gave the following instruction to the jury:

"You must determine this case upon the law as given you by the court, and the evidence as you have heard it from the witness stand, but in so doing you may call to your aid and use the knowledge and experience you possess in common with the generality of mankind, Held not erroneous."

This is practically the charge complained of by the plaintiff in error. Had the court given the charge in the language of the Kansas Court above quoted, the jury would have been at liberty to have applied the knowledge and experience they possess in common with the generality of mankind, to the question as to the use of coal oil for building fires, and by elaborating the charge and calling their attention to the fact that they may apply such general knowledge and experience to this particular subject, the court certainly did not depart from the rule laid down by the Kansas Court.

3.—REFUSAL TO GIVE INSTRUCTION NUMBER FIVE REQUESTED BY THE DEFENDANT.

The request for this instruction is based upon the assumption of the counsel for plaintiff in error that the Inspection Law of 1899 is void. We think, from what has heretofore been said upon this question that it must conclusively appear that the '99 inspection law is not void, except that the last part of Section 4, providing a penalty against corporations, but not for individuals, for the doing of the same act may be held inoperative. But that has nothing to do with this case or any question involved in it. Counsel say in their brief in the court below that the invalidity appearing in Section 4 carries down the whole act, and cite Pollock vs. Farmers Trust Co. 157 U. S. 427, in support of that statement. We have examined this case, and find that it does not decide anything upon this question, and we quote what it does say:

"Upon each of the other questions argued at the bar, to-wit:

1. Whether the void provisions as to rents and income from real estate invalidate the whole act?

2. Whether as to the income from personal property, as such, the act is unconstitutional as laying direct taxes?

3. Whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity on either of the grounds suggested? The justices who heard the argument are equally divided, and, therefore, no opinion is expressed."

But where a part of an act which may be held to be invalid, may be dissevered from the rest of the act, or where it is not interwoven as to become an essential and inseparable part of the whole act, does not carry down with it the whole act, is beyond dispute, and we refer the court to the authorities heretofore cited upon this subject.

But this requested instruction would not be a correct statement of the law under the Inspection Act of 1895. The coal oil part of the mixture received by the firm of Powers & Deselms had been inspected and the fees for such inspection

charged up to them by the defendant Company which they paid, and there is nothing in the 1895 Act requiring them to have the oil inspected over again when they had no knowledge or even suspicion, that a quantity of gasoline had been added to the oil after the inspection. The 1895 Act in Section 1 which was not repealed by the 1899 Act, and is still the law, expressly provides that oil *"once having been inspected in the Territory by a qualified Territorial Inspector, or deputy, can be shipped to any portion of the Territory without additional inspection."*

4.—REFUSAL TO GIVE INSTRUCTION NUMBER ELEVEN AS REQUESTED

Printed Record page 144.

This instruction is not a correct statement of the law, and was properly refused. The court is asked to charge the jury that if they find the mixture to be a dangerous substance, and to have been negligently put on the market by the defendant, that the defendant could not be held liable, unless the jury should further find that the defendant sold and marketed the oil with the expectation and *intention* that it would be retailed and used for other than illuminating purposes or for kindling fires. It is not a matter of what the defendant *expected* or *intended* that the mixture should be used for, but what an ordinarily cautious and prudent person might have foreseen. It is not necessary that the precise injury could even have been foreseen; all that is necessary is that the injury would naturally or probably result from the negligent act of sending this dangerous substance out upon the public.

In R. R. Co. vs. Parry, 67 Kans. 519, the Kansas Court quotes with approval the following:

"It is not necessary, say the Supreme Court of Minnesota following the Supreme Court of Massachusetts, that the injury in the precise form in which it in fact resulted, should have been foreseen. It is enough that it now appears to have been the natural and probable consequence. In other words,

it is not necessary to a defendant's liability, after his negligence has been established, to show, in addition thereto, that the consequences of his negligence could have been foreseen by him; it is sufficient that the injuries are the natural, though not necessary and inevitable, result of the negligent fault."

The authorities heretofore cited under the head of proximate cause are also in point here.

IV.

DAMAGES RECOVERED.

The first complaint under this head is that the court's instruction as to the damages was erroneous. This is instruction 14 (Record page 142), and we quote it in full:

"In determining the amount of your verdict for the plaintiff, if you find for the plaintiff, you should not take into consideration the pain suffered by the deceased, or wounded feelings of the father or other survving relatives, but your verdict must be limited to such amount, if any, as you believe that plaintiff has suffered financially by reason of the death of his children. In other words, the recovery, if any, is to be a pecuniary compensation for a pecuniary loss, and such finding of loss must be based upon the evidence introduced in the case. The amount of damages cannot be fixed by the evidence but must be the result of your own judgment."

This instruction, taken as a whole, is not subject to any complaint from the plaintiff in error, and its general language is approved by the best courts in the land. In U. P. Railway Co. vs. Dunden, 37 Kans. 1, on page 5, it is said:

"It is next claimed that the trial court erred in instructing the jury, that if they found for the plaintiff they could use their common knowledge in assessing his damage without evidence as to the amount thereof. The language of the instruction may perhaps be criticized, but the instruction as applied to this case, was neither erroneous or misleading. In such a case as this the jury may estimate the pecuniary damages from the facts proved, in connection with their own common knowledge and experience in relation to matters of common obser-

vation * * * How this pecuniary damage is to be measured, or what shall be the amount, must be left to the discretion of the jury. The court undoubtedly intended by the instruction to inform the jury, and they must have understood, that if they found for the plaintiff they could use their common knowledge in assessing his damages, without direct evidence of the specific pecuniary loss * * * It is impracticable to furnish direct evidence of the specific loss occasioned by the death of the child; and to hold that without such positive proof a plaintiff could not succeed, would in effect defeat any substantial recovery."

"The assessment of damages for the wrongful death does not admit of fixed rules and mathematical precision, and hence is a matter left to the sound discretion of the jury."

R. R. Co. vs. Spence, 23 S. W. 211.

"The damages in these cases, whether the suit is in the name of the injured party, or in case of his death under the statute, by the legal representative, must depend very much on the good sense and sound judgment of the jury."

R. R. Co. vs. Barron, 5 Wall 90.

The only remainng ground of complaint, of the plaintiff in error, is that the damages allowed by the jury are excessive. This is in the nature of a plea for mercy, after the wrong doer has been proven guilty and the penalty of his crime is about to be imposed. Our statute does not authorize a verdict to be set aside as excessive, in this class of cases, unless it appears to have been given under the influence of passion or prejudice. General Statutes 1893, Section 4196, 4th subdivision which reads as follows: "Excessive damages, appearing to have been given under the influence of passion or prejudice." The 5th sub-division of said section authorizing a new trial for error in the assessment in the amount of the recovery, whether too large or too small, is limited to actions upon contract, or for the injury or detention of property. The fifth sub-division reads as follows: "Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract or for the injury or detention of property." It is clearly the intention of the Legislature, by this statute, to

leave entirely to the jury the amount of damages in this character of an action, unless the trial court shall find that the verdict was given under the influence of passion or prejudice. Otherwise the limitation contained under the 5th sub-division limiting the power of the court to grant new trials for error in assessment of the amount of the recovery, whether too large or too small, to actions on contract, or for the injury or detention of property, is without meaning. In allowing actions of this kind to be brought, the Legislature having fixed a maximum sum for each recovery, to-wit: $10,000 for each death, General Statutes of 1893, Section 4313, and within this limit the jury are the judges of the amount of the damages, unless the court finds that their verdict was influenced by passion or prejudice. In this case the trial judge who heard the evidence, has found that the verdict was not influenced by passion or prejudice, and sustained the verdict of the jury. The trial judge heard the entire case, he saw the demeanor and conduct of the jury, he saw the manner in which the case was conducted on both sides, he presumably knew the jurors, and with this full knowledge of the facts, he has found that this verdict was not influenced by passion or prejudice. The plaintiff in error now asks the Apellate Court, who has had none of these advantages in passing on these questions, to reverse this finding of fact and to say that the verdict was influenced by passion and prejudice. The record shows on page 19-147, that the defendant below declined to make any statement of its case to the jury, and it also appears, record page 147, that after counsel for the plaintiff had made their opening address to the jury, in which it may be presumed that the full limit of damages were demanded, the defendant again declined to make any address to the jury, thereby at least tacitly, conceding whatever was claimed or demanded by the plaintiff. This conduct smacks of that sort of practice which would seek to induce an error on the part of the court or jury in order to take advantage of the same on appeal. If counsel had any views as to the proper amount of damages, or any views as

to the value of the lives of these children to their father, it was their duty to have presented them to the jury.

Under these circumstances with the case tacitly conceded so far as the jury was concerned, can it be said or presumed, or found as a fact, that the jury were influenced by passion or prejudice in returning their verdict. The court properly charged the jury that the amount of damage to be allowed for each death was limited to $10,000. Had they been influenced by passion or prejudice, or by the horrors which the circumstances of this case would naturally inspire, they would have allowed the full limit for each death. The fact that they did not go to the limit, is proof, under the circumstances of this case, that they were not influenced by passion or prejudice. There is no doubt but that there is a great diversity of views among the courts of the different states on this subject, but this may largely be accounted for upon the ground of the difference in the statutes of the different states. Some of the courts also adhere to the rule that the general pecuniary loss embraces only losses of money, while the better considered cases do not consider it in so strict or limited a sense; in some States the rule has been adopted that a parent may only recover for the pecuniary loss or for the pecuniary value of his child to him until he becomes of age, an instance of which appears in Parsons vs. Mo. Pac. R. R. Co. 94 Mo. 286, cited by plaintiff in error, but the great weight of modern authority, including the decisions of Kansas, from which our statute is taken and the decisions of the Supreme Court of the United States is against these strict and limited rules.

In the case of Gas Co. vs. Carter, 65 Kans. 569, the court say:

While, as has been held by this court, no inflexible rule can be laid down covering all cases, as each case must be ruled by its particular circumstances, yet from the authorities, it is safe to say that while the statute limits the amount of recovery in any given case to $10,000, within this limit just compensation for loss sustained by the wrongful act, is not, by the law, meted out with miser hand."

In K. P. R. R. Co. vs. Cutter, 19 Kans. 83, the following language is used by Mr. Justice Brewer speaking for the court:

"In determining the amount of such compensation, much must be left to the good sense and sound judgment of the jury upon all the facts and circumstances of the case. No uniform and precise rule can be laid down for estimating the value to the survivor of the life of the deceased, for the elements which go to make up such value was personal to each case. * * * All that can well be done is to say that the jury may take into consideration all the matters which go to make the life taken away of pecuniary value to the survivors, and, limited by the amount named in the statute, award compensation therefor."

This decision is of peculiar value, as it is a construction of our statute by the Kansas Court before we adopted it from that state, and therefore the statute came to us with this con-construction.

-In Ihl vs. 42nd. Street Railway Co. 47 N. Y. 317, the following language is used:

"It is within the province of the jury to form an estimate of the damages with reference to the pecuniary injury, personal or resulting to the next of kin; except in very rare instances it would be impracticable to furnish direct evidence of any specific loss occasioned by the death of a child of such tender years. It cannot be said as a matter of law, that there is no pecuniary loss in such a case, or that the expense in maintaining the child would necessarily exceed in pecuniary advantage what the parent would have derived from his service had he lived. These calculations are for the jury."

In Morris vs. R. R. Co. 71 N. Y. S. 321 a verdict for $7,500 for the death of a boy sixteen years old was declared not to be excessive.

In the case of Austin Rapid Transit Co. vs. Cullen, 29 S. W. 256, a verdict for $6,000, for the death of a child two years old was sustained, the court using the following language:

"It was in proof that the parents were poor; that the child was a stout, healthy and sensible boy twenty-five months old. He was just beginning to talk, but could understand what was

said to him and would obey his mother. The case was not susceptible of more exact proof of damages than was produced on the trial. It would not have been proper to call witnesses to express opinions as to the amount of pecuniary loss. In such cases the jury must estimate the damage from the facts in proof upon their own knowledge and experience. The law does not fix the amount of damages, and witnesses cannot be called to estimate them. They must be left to the sound sense and discretion of the jury."

In McDonald vs. Met. St. R. R. Co., 74 N. Y. S. 367, a verdict of $7,500 for a boy twelve years old was sustained.

In Birkett vs. Ice Co., 110 N. Y. 504, it is said:

"In an action under the code to recover the pecuniary injuries resulting from the death of a young child, caused by the wrongful act or negligence of the defendant, the recovery is not limited to nominal damages merely. The amount of damages, upon such proof as can be made, is for the determination of the jury, except to be reviewed and modified, if the discretion is abused, in the court of original jurisdiction, but not in this (Appellate) Court. It seems that in estimating the pecuniary value of such a child to its next of kin, the jury are not bound to confine their consideration to the minority of the child, and they may take into consideration all the probable, or even possible benefits which might result to them from its life, modified, as in their estimation it should be, by the chances of failure or misfortune."

In R. R. Co. vs. Barron, 5 Wall. 90, it is said:

"The only relation, mentioned by the statute, of the deceased, essential to the maintenance of this suit, is that of widow or next of kin; to say they must have a legal claim on him for support would be an interpolation in the statute, changing the fair import of its terms and hence not warranted."

In Houghkirk vs. Canal Co. 92 N. Y. 219, a verdict of $5,000, which was the limit allowed by the statute, for the death of a child six years old, was held not excessive.

But as above suggested, this question is one of fact to be settled by the trial court whose ruling thereon should not be reviewed by this court on writ of error.

In the case of Wabash R. R. Co. vs. McDaniels, 107 U. S. 454, Mr. Justice Harlan delivered the unanimous opinion of the court says:

"That we are without authority to disturb the judgment upon the ground that the damages are excessive cannot be doubted. Whether the order overruling the motion for a new trial was erroneous or not, our power is restricted to the determination of questions of law arising upon the record."

In N. Y. etc. R. R. Co. vs. Winter, 143 U. S. 60, the following language is used:

"Whether the verdict was excessive, is not our province to determine on this writ of error; the correction of that error if there were any, lay with the court below upon motion for a new trial, the granting or refusal of which is not assignable for error here. It may be that if we were to usurp the functions of the jury in determining the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province on a writ of error. In such a case we are confined to the consideration of exceptions, taken at the trial, to the admission or rejection of evidence, and to the charge of the court and its refusal to charge. We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted."

In case of Hughey vs. Sullivan, 80 Fed. 72, on page 76, it is said:

"It was distinctly ruled in R. R. Co vs. Winter, and in R. R. Co. vs. Charless, that the question whether the damages given by the jury were excessive could not be reviewed on a writ of error; and, of course, the same rule applies to the question of inadequacy. This is because the Federal Constitution has prohibited the re-examination of facts tried by a jury in any other way than according to the rule of the common law, and by the trial judge or other judges who may perform his functions in that behalf."

In Homestead Mining Co. vs. Fullerton, 69 Fed. on page 931, it is said:

"It is finally insisted by the defendant that the damages assessed by the jury are excessive, and that the verdict ought to be set aside for that reason. The Circuit Court had an un-

doubted right to set aside the verdict and order a new trial, and it should have been exercised, if, in view of the amount of recovery, it was satisfied that the jury had been influenced by prejudice or passion, or that they had made a gross mistake of fact in assessing the damages. It is needless to say, however, that we are not possessed of any such revisory power, inasmuch as the damages assessed are less than the sum alleged and claimed in the complaint. This court is limited to the inquiry whether the jury was properly directed as to the mode of assessing the damages."

In Smith vs. Sun Printing and Publishing Association, 55 Fed. 240, on page 248, it is said:

"There is nothing to show that the verdict was as defendant contends the result of passion and prejudice. When the proper rule for computation of damages has been given to the jury, a verdict cannot be set aside as excessive in the Federal Courts, upon a writ of error."

In the case of Gale vs. N. Y. Cen. etc. Co. 76, N. Y. 594, the syllabus reads:

"This court has no jurisdiction to reverse a judgment in an action for negligence because of excessive damages."

In Illinois the Supreme Court formerly reviewed a verdict for excessive damages in law actions; but the laws of that state were then amended so as to declare explicitly that the Supreme Court should have no power to review questio of fact. Since then that court, recognized that this question is one of fact, and held that it was not reviewable by them.

Chicago etc. Cab Co. vs. Haveick, 131 Ill. 179.
Jollette St. R. R. Co. vs. Call, 143 Ill. 177.
West Chicago R. R. Co. vs. Bode. 150 Ill. 396.

This is the law in Michigan:

"Whether damages found by a jury are excessive or not does not present a question of law. If no improper testimony affecting the subject of damages has been admitted, and the court has given to the jury proper instruction to guide them in reaching a conclusion, the amount of damages awarded is beyond the reach of a writ of error."

Hunn vs. Mich. Cen. R. R. Co., 78 Mich. 513.

In the case of Nelson vs. Oregon Rly. etc. Co. 13 Ore., 141, the court says:

"Where the verdict of a jury is excessive it is the duty of the *nisi prius* court to set it aside, but its refusal to do so cannot be reviewed by this court. Nothing but question of law appearing upon the transcript can be reviewed here. The verdict herein may have been much larger than this court would have allowed under the evidence in this case, or in view of the facts found by the jury. Still we have no right to set it aside or modify the judgment entered thereon. The jury are the judges of the fact, and however widely our views might disagree with theirs, matters nothing. We have no right to evade their province, however sanguine we may be that they have committed error."

This case was followed in the case of Kumli vs. S. Pac. R. R. Co., 21 Ore. 505.

It is said in Dowd vs. Air Brake Co., 132 Mo. 579, on page 583:

"But the weight of the evidence and the amount of damages to be awarded, were for the consideration of jury, who had the opportunity of meeting the witnesses face to face, and of observing their demeanor on the witness stand. The trial Judge had the same opportunities, and if there had been anything justifying the imputation that the verdict was the result of bias or prejudice, it must be presumed that he would have set the verdict aside and granted a new trial."

In cases where there is no legal standard of damages, if the appellate court does not find error in the admission or rejection of evidence or the instructions, the objection that the amount awarded by the jury is excessive or insufficient is not available.

Meeks vs. St. Paul, 66 N. W. 966;
Nelson vs. West Duluth, 57 N. W. 149;
Nelson vs. Oregon R. & N. Co. 9 Pac. 321;
Lancaster vs. Providence & S. S. S. Co. 26 Fed. 233
Brushaber vs. Stegemann, 22 Mich. 255.

We think these decisions are conclusive on the proposition, that the question as to the amount of damages, or

whether the verdict has been rendered under the influence of passion or prejudice, or not, are purely questions of fact which must be left primarily with the jury, to be modified or corrected by the trial court only, and taken in connection with the decisions of our own court, which has held repeatedly that the findings of fact of the jury or trial court will not be disturbed.

Watt vs. Ames, 14 Okla. 178.
Abbott vs. Keller, 14 Okla. 281.

There is another phase of this question to which we desire briefly to call the court's attention. This is clearly a case where exemplary damages should be allowed. Our statute, Sec. 2617, General Statutes 1893, provides: "In any action for the breach of an obligation not arising from contract, when the defendant has been guilty of oppression, *fraud* or malice, actual or presumed, the jury in addition to the actual damages may give damages, for the sake of example, and by way of punishing the defendant."

The negligence alleged and established, amount to actual fraud, and it is difficult to find in the books a case more deserving the imposition of exemplary damages and when exemplary damages are allowable, all courts hold, that the fixing of the amount of the same is purely a matter for the jury.

The doctrine that courts will not interfere to set aside a judgment as excessive, has special force if the case calls for the allowance of punitive as well as compensatory damages.

In N. W. & M. V. R. R. Co. vs. Deutzel adm. (Ky.) 14 S. W. 958, on page 960 it is said:

"We do not feel at liberty to disturb the verdict upon the score that it is excessive, * * * It was the province of the jury to fix the damages. They had a right not only to find the damages by way of compensation * * * but also to award such exemplary damages as under the circumstances they saw fit. Having the right to award both, we cannot un-

dertake to say that the verdict is so excessive as to authorize a reversal."

Kansas recognizes the rule that exemplary damages may be allowed in this character of a case when the facts warrant it.

K. P. R. R. Co. vs. Cutter, 19 Kans. 83, on page 93.

"A motion to set aside a verdict in an action for damages on the ground that the award is excessive, and not warranted by the evidence, is addressed to the discretion of the trial judge, and the exercise of such discretion is not reviewable."

The verdict in this case was $12,000.

Benham vs. R. R. Co., 122 N. C. 1007.

Norton vs. R. R. Co. 122 N. C. 910, the court say:

"The refusal of the trial court to set aside a verdict on account of excessive damages cannot be reviewed on appeal."

We quote the following from the Milwaukee etc. R. R. Co. vs. Arms, 91 U. S. 489, 28 L. Ed. 374:

"As the question of intention is always material in an action of tort, and as circumstances which characterize the transaction, are therefore proper to be weighed by the jury in fixing the compensation of the injured party, it may well be considered whether the doctrine of exemplary damages cannot be reconciled with the idea that compensation alone is the measure of redress. But jurists have chosen to place this doctrine on the ground, not that the survivor is to be compensated, but that the offender is to be punished; and although the soundness of it has been questioned by some text writers and courts, it must be accepted as the general rule in England and in most of the states in this country. It has also received the sanctiono of this court * * * Whenever the injury complained of has been inflicted maliciously or wantonly, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. The malice spoken of in this rule is not merely the doing of an unlawful or injurious act, but the word implies that the wrong complained of was conceived in the spirit of mischief or criminal indifference to civil obligation."

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The phrase, "criminal indifference to civil obligations," is peculiarly appropriate to the conduct of the defendant Company in this case; it was indeed a direct violation of the penal clause, which applies to corporations and individuals alike, in the first part of Sec. 4, of the 1899 inspection act, and would have warranted a conviction of the individuals, who knowingly did the behests of the Oil Company in placing this dangerous substance upon the market, of the crime of manslaughter.

In Crouch vs. Ches. etc. R. R. Co., 30 S. E. 147, the Supreme Court of West Virginia uses the following language:

"The Legislature having great confidence in the integrity of the jury system, and a full reliance on the intelligent moral uprightness, clear sense of justice and impartiality of their fellow citizens when called upon, in the capacity of jurors ,to sit in solemn judgment upon the lives, liberty, and property of others, clothe the jury with full power to determine the amount and character of damages that should be imposed upon a wrong doer who by his negligence caused the death of his neighbor; the only restriction imposed being that such damages should not exceed $10,000." * * *

In the case of Turner vs. R. R. Co. 40 W. Va. 693 (33 S. E. 89.) it is said:

"The doctrine of punitive damages should be the same in cases where death ensues from the act of negligence as where it does not ensue * * * In all cases of negligence the law covering the terms of exemplary, punitive or vindicative damages, is the same whether death results or not."

The petition in this case charges the negligent act of the defendant Company to have been done knowingly, wilfully, wantonly, wrongfully and in a grossly negligent manner, which makes the pleading amply sufficient to authorize the jury to consider the case under the section of the statute above set forth.

The provisions of our statute relating to death by wrongful act are found in Sections 4313-4314, Statutes of 1893, and they provide that when the death of one is caused

by the wrongful act or omission of another, the next of kin of the former, may maintain an action against the latter, if the former might have maintained an action had he lived, for an injury for the same act or omission, and limits the amount of recovery to $10,000. There is no other limitation in the statute; neither the word pecuniary nor compensatory, or other qualifying words are used. An action for damages is authorized, and we think it apparent, that this provision must be construed together with Section 2617 above quoted, which in express terms authorizes the allowance of punitive damages.

The Colorado Statute, relating to death by wrongful act, appears to be similar to our own, and without reference to any express statute authorizing punitive damages, the case of Kansas etc. R. R. Co. vs. Miller, 2 Colo. 442, on page 467, recognized the rule that exemplary damages should be allowed in proper cases for death by wrongful act.

It may be contended by plaintiff in error, because this is a writ of error to the Supreme Court of a territory, that the rule that this court will not review any question as to the amount of damages recovered, as announced in the authorities above cited, does not apply. It will be sufficient to say that writs of error from the final decision of the Supreme Court of Oklahoma Territory are provided for by the 9th Section of the Act of May 2, 1890 (Organic Act), (26 Stat. at L. 81, 85, chapter 182) and provides that writs of error and appeal from the final decision of the Supreme Court of that Territory will be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit Courts of the United States. Oklahoma City vs. McMaster, 196 U. S. 529.

It must follow that only those questions can be reviewed by this court on writ of error to the Supreme Court of *Oklahoma Territory* as can be reviewed on writ of error to the Circuit Courts of the United States. N. Y., L. ". & W. R. Co. vs.

Winter, 143 U. S. 60, above cited, was a writ of error to the Circuit Court of the United States, and this Court decided that it could not inquire whether the verdict was excessive or not.

Respectfully submitted,

A. K. HUSTON,

Attorney for Defendant in Error.

WATERS-PIERCE OIL COMPANY *v.* DESELMS.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 62. Argued January 8, 1909.—Decided February 1, 1909.

In the construction of a statute a superfluous negative may be omitted where the meaning is apparent, as in this case.

Where the subject is within the power of the State it is not within the province of the judiciary to disregard statutory standards on the ground that the legislature did not act wisely in enacting them.

Provisions for unequal punishment of corporations and individuals for violations of the same statute, *held*, in regard to the Oklahoma Territory Oil Inspection Law, to be separable, and, even if unconstitutional, not to affect the prohibitions contained in the statute against the use of oil not conforming to the standards fixed thereby.

Under the circumstances of this case, this court will not hold that the Supreme Court of Oklahoma erred in judicially noticing a custom in the Territory to use coal oil in kindling fires.

While the burden on the plaintiff is not satisfied by showing an accident and an injury, where there was adequate proof to show that an explosion occurred which could only have occurred by the unlawful character of articles sold by defendant, a peremptory instruction for defendant is properly refused.

Where the original vendor knowingly sells, as coal oil, a mixture of coal oil and gasoline, of such inflammable character as to be unlawful under the local statute, to a vendee who in ignorance of its unlawful nature sells it to a third party in like ignorance, the original vendor is directly responsible to the final purchaser for the consequences of an explosion, produced solely by reason of such unlawful nature while the oil is being used in a legitimate manner. In such a case the responsibility of the original vendor rests not on contract but in tort.

On the facts in this case, and in view of the ignorance of both vendees in regard thereto, the unlawful character of the articles sold *held* to be the proximate cause of plaintiff's injuries; but *quære*, and undecided, whether the original vendor would have been relieved of responsibility if the first vendee had knowledge of the unlawful character of the article.

Held, in a case on error to the Supreme Court of the Territory of Oklahoma, that this court does not possess the power to grant a new trial solely on the ground that the jury awarded excessive damages.

When the court, at defendant's request, has charged as to the general rules of ascertaining plaintiff's damages, it is not error to add that the amount, as in this case for death of infant children, had not been fixed by the evidence, and that the verdict must be the result of the jury's own judgment.

If an ambiguity exists in the charge counsel should at the time ask the court to remove it.

18 Oklahoma, 107, affirmed.

THE facts are stated in the opinion.

Mr. John W. Shartel, with whom *Mr. J. D. Johnson*, *Mr. James R. Keaton* and *Mr. Frank Wells* were on the brief, for plaintiff in error:

The plaintiff's case is not made by showing the negligent admixture and his purchase of a portion of that mixture. He also takes the burden of proving it to have been the efficient cause of the fire; that the accident would not have happened if the oil had not had the gasoline in it; and that the accident is the result of its super-inflammability. *Haff* v. *Minneapolis & St. Louis Ry. Co.*, 14 Fed. Rep. 558; *Willoughby* v. *Chicago & N. W. Railway*, 37 Iowa, 432; *Kelsey* v. *Jewett*, 28 Hun, 51; *Central R. R.* v. *Freeman*, 75 Georgia, 331; *Harrizan* v. *Chicago & I. R. Co.*, 53 Ill. App. 344; *A., T. & S. F. R. R. Co.* v. *Aderhold*, 49 Pac. Rep. 83; *Mobile & O. R. Co.* v. *Wilson*, 76 Fed. Rep. 127; *Mo. Pac. Ry. Co.* v. *Porter*, 73 Texas, 307; *S. C.*, 11 S. W. Rep. 324; *T. & N. O. Ry. Co.* v. *Crowder*, 63 Texas, 505; *C. & O. Ry. Co.* v. *Sparrow's Admr.*, 98 Virginia, 630, 641; *S. C.*, 37 S. E. Rep. 302; *N. & W. R. R. Co.* v. *Cromer's Admr.*, 99 Virginia, 763; *S. C.*, 40 S. E. Rep. 54; *Southern R. R.*

Co. v. *Hall's Admr.*, 102 Virginia, 135; *S. C.*, 45 S. E. Rep. 867; *N. & W. Ry. Co.* v. *Poole's Admr.*, 40 S. E. Rep. 627; *Yaggle* v. *Allen*, 48 N. Y. Supp. 827; *Grant* v. *Railroad Co.*, 31 N. E. Rep. 220; *Pueblo Light Co.* v. *McGinley*, 38 Pac. Rep. 425; *McBroom* v. *Putney*, 28 Indiana, 353; *Connor* v. *Pacific Ry.*, 81 S. W. Rep. 149; *Loop* v. *Litchfield*, 42 N. Y. 351; *Losee* v. *Clute*, 51 N. Y. 494; *Davidson* v. *Nichols*, 93 Massachusetts, 514; *Goodlander Mill Co.* v. *Standard Oil Co.*, 63 Fed. Rep. 400; *Cleveland &c. Rd.* v. *Ballantyne*, 84 Fed. Rep. 937; *Standard Oil Co.* v. *Murray*, 119 Fed. Rep. 575.

Section 2, Ch. 21, Session Laws of 1899 (Oklahoma), is void, in that it is utterly unintelligible when it is borne in mind that the Baume scale for liquids lighter than water is an inverse scale so that a reading of forty degrees denotes a heavier oil than a reading of forty-six degrees.

The gravity test cannot be upheld as a police regulation, because if the statute is read downward on the Baume scale, it would exclude the Pennsylvania oils; and if this statute is read upward it would have the effect to exclude everything from the market of Oklahoma except Pennsylvania oils. This testimony is uncontradicted, and the law is void. *Priewe* v. *Wisconsin State Land Co.*, 67 N. W. Rep. 918; *State* v. *Santel* (Iowa), 82 N. W. Rep. 445; *Matter of Jacobs*, 98 N. Y. 98; *State* v. *Smith*, 58 Minnesota, 35; *State* v. *Julow*, 129 Missouri, 163; *Janesville* v. *Carpenter*, 77 Wisconsin, 288; *St. Louis* v. *Door* (Mo.), 41 S. W. Rep. 1094; *Mugler* v. *Kansas*, 123 U. S. 623-667; *Corrigan* v. *Gage*, 68 Missouri, 541; *Haines* v. *Cape May*, 50 N. J. L. 55; *Kimmish* v. *Ball*, 129 U. S. 466; *Scholenberg* v. *Pennsylvania*, 171 U. S. 1; *Smyth* v. *Ames*, 169 U. S. 466; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *Railroad Co.* v. *Gill*, 156 U. S. 649; *People* v. *Marx*, 2 N. E. Rep. 29; *S. C.*, 99 N. Y. 377.

The court will take judicial notice of the facts which conclusively show that the gravity test of the act in question is not a valid police regulation. Sutherland on Stat. Constr., §§ 301-306.

Instructions 5, 6 and 7 were clearly erroneous and should not have been given.

The plaintiff had no right to go to the jury on the question as to the usual and ordinary purposes for which coal oil is ordinarily used, nor to have submitted to the jury a supposed custom, because those are matters of pleading and evidence, and the evidence is entirely silent on the subject, as well as being unsupported by any allegation in the petition. *Mobile Fruit Co.* v. *Judy*, 91 Ill. App. 82; *Lindley* v. *Bank*, 76 Illinois, 629; *Hayden* v. *Grillo*, 42 Mo. App. 1; *Gans* v. *Palo Pinto Co.*, 71 Texas, 99; *S. C.*, 8 S. W. Rep. 634; *Hendricks* v. *Middlebrooks*, 44 S. E. Rep. 835.

If the custom had arisen into the dignity of a law of the land, it was the court's duty to have so instructed the jury as a matter of law, and not leave the subject to them to deal with. *Buyck* v. *Schwing*, 100 Alabama, 355; *S. C.*, 14 So. Rep. 48; *Robertson* v. *Wilder*, 69 Georgia, 340; *Wilson* v. *Bannan*, 80 Illinois, 493; *Careby* v. *Frick*, 8 Maryland, 163.

Custom or usage must be proved. The jury's knowledge of it cannot be availed of. *Senluc* v. *Pritchard*, 4 Louisiana, 160; *Tryson* v. *Laidlaw*, 18 Louisiana, 380.

It was not a custom dignified with a force the equivalent of a law of the land. It required pleading and proof, and could not be submitted to the jury in the absence of appropriate allegations supported by proof. *Packard* v. *Van Scoic*, 58 Illinois, 79; *Randall* v. *Koehler*, 60 Maryland, 37; *S. C.*, 11 Am. Rep. 169; *Murray* v. *Hatch*, 6 Massachusetts, 465; *Livingston* v. *Maryland*, 7 Cranch, 506.

It was error on the part of the court to tell the jury that the question of damages could not be fixed by the evidence but must be the result of their own judgment.

The verdict of the jury for $14,500 for wrongfully causing the death of the four-year-old child and two-year-old child would denote an equivalent of $7,250 for each child, which is far out of range of what any court has sustained, as appears in the following cases. *Vicksburg* v. *McLean* (Miss.), 6 So. Rep.

774; *Wells* v. *Railroad Co.*, 78 N. Y. Supp. 999; *Fleming* v. *Loebel* (N. J.), 59 Atl. Rep. 27; *Little Rock Ry.* v. *Barker*, 33 Arkansas, 350; *Myers* v. *San Francisco*, 42 California, 214; *North Chicago R. R.* v. *Wixon*, 51 Ill. App. 307; *Parsons* v. *Mo. Pac. Ry.*, 6 S. W. Rep. 464; *S. C.*, 94 Missouri, 286; *Riley* v. *Salt Lake R. Co.*, 37 Pac. Rep. 681; *S. C.*, 10 Utah, 428; *Hively* v. *Webster Co.*, 91 N. W. Rep. 1041; *S. C.*, 117 Iowa, 672; *Rowe* v. *Telephone Co.* (N. J.), 48 Atl. Rep. 523; *Connaughton* v. *Sun Printing Co.*, 76 N. Y. Supp. 755; *Graham* v. *Traction Co.*, 44 Atl. Rep. 964; *Louisville & Nashville Ry. Co.* v. *Creighton* (Ky.), 50 S. W. Rep. 227; *West Chicago St. Ry. Co.* v. *Nabie*, 77 Ill. App. 176; *Fox* v. *St. Ry. Co.*, 118 California, 55; *S. C.*, 50 Pac. Rep. 25; *Con. Trac. Co.* v. *Graham*, 40 Atl. Rep. 773; *McDonald* v. *Steel Co.* (Mich.), 103 N. W. Rep. 829.

Mr. A. H. Huston and *Mr. John Devereux* for defendant in error:

The negligence complained of need not be the only cause, or the most proximate cause, and negligence to be the proximate cause of an injury must be such that a person of ordinary caution and prudence would have foreseen that some injury would likely result therefrom, not that the specific injury would result. The question of proximate cause, whenever there is any doubt, must always be submitted to the jury. Bishop on Rights and Torts, §§ 450–455; *Baltimore R. R. Co.* v. *Kemp*, 61 Maryland, 74; *Terre Haute R. R. Co.* v. *Buck*, 96 Indiana, 346; *Scott* v. *Hunter*, 46 Pa. St. 192; *Milwaukee R. R. Co.* v. *Kellog*, 94 U. S. 469, 474; *Kansas City* v. *Gilbert*, 65 Kansas, 469; *A., T. & S. F. R. R. Co.* v. *Parry*, 67 Kansas, 515; *Hays* v. *Mich. Cent. R. R. Co.*, 111 U. S. 228.

Where there is no intervening efficient cause the original wrong must be considered as reaching to the effect and proximate to it. *Hays* v. *Williams*, 17 Colorado, 465; *The G. R. Booth*, 171 U. S. 450; *The Ontario*, 37 Fed. Rep. 220; *Railroad Co.* v. *Elliott*, 55 Fed. Rep. 949.

The rule that where there were no eyewitnesses to the origin

of the explosion and fire, such origin must rest wholly in conjecture, and the case must fail for want of proof, does not apply where there is room for balancing the probabilities and drawing reasonable inferences which do account for the injury. *Schoepper* v. *Chemical Co.*, 113 Michigan, 582; *Gas Co.* v. *Carter*, 65 Kansas, 565; *Seybolt* v. *Railroad Co.*, 95 N. Y. 562; *Lutton* v. *Vernon*, 62 Connecticut, 1; *McBride* v. *Railroad Co.*, 19 Oregon, 64; *Railroad Co.* v. *Freeman*, 48 U. S. App. 757; *Toledo &c. Co.* v. *Chisholm*, 83 Fed. Rep. 652; *Stowell* v. *Standard Oil Co.*, 102 N. W. Rep. 227.

The determination of the question as to whether the injury resulted from a mere accident wherein no one was at fault, or was caused by the negligence of the party injured or whether it is attributable to the dangerous mixture, is a matter for the jury. *Pittman* v. *City of El Reno*, 2 Oklahoma, 414; *Ruch* v. *Gas Electric Co.*, 65 N. J. L. 399; *N. Y. &c. R. R. Co.* v. *New Jersey*, 60 N. J. L. 52; *Railroad Co.* v. *Middleton*, 57 N. J. L. 154; *Malnken* v. *Freeholder*, 41 Atl. Rep. 921; *Schoepper* v. *Chemical Co.*, 113 Michigan, 582; *Toledo R. R. Co.* v. *Chisholm*, 83 Fed. Rep. 1652; *Texas C. R. R. Co.* v. *Gentry*, 163 U. S. 353; *Burns* v. *Chicago &c. R. R. Co.*, 69 Iowa, 450.

It cannot be said as a proposition of law that the use of coal oil to kindle fires is contributory negligence. *Ives* v. *Weldon*, 114 Iowa, 476; *Riggs* v. *Standard Oil Co.*, 130 Fed. Rep. 199, 204; *Ellis* v. *Republic Oil Co.*, 133 Iowa, 11.

A person placing on the market for general use a dangerous explosive which he represents and sells as a safe illuminant, is liable for any damages caused by such substance either in the hands of his immediate vendee or a remote purchaser. The rule that a seller of an article of commerce not in itself dangerous, is not responsible for consequences to the purchaser of his vendee resulting from defects in the articles sold, does not apply in this case. *Elkins, Bly & Co.* v. *McKean*, 79 Pa. St. 493; *Judson* v. *Giant Powder Co.*, 107 California, 549; *Wellington* v. *Oil Co.*, 104 Massachusetts, 64; *Rose* v. *Stevens &c. Co.*, 11 Fed. Rep. 438; *Stowell* v. *Standard Oil Co.*, 102 N. W. Rep. 227;

Clement v. *Crosby*, 111 N. W. Rep. 745; *Thomas* v. *Winchester*, 2 Seld. 397.

The burden of proving contributory negligence rests on the defendant, and it will not save the defendant, unless it has been established by a preponderance of the evidence. *Railroad Co.* v. *Horst*, 93 U. S. 291; *Hough* v. *Railroad Co.*, 100 U. S. 213; *Railroad Co.* v. *Gladman*, 15 Wall. 401; *Railroad Co.* v. *Harmon*, 147 U. S. 571; *Railroad Co.* v. *Phillbert*, 25 Kansas, 583; *Railroad Co.* v. *McCally*, 41 Kansas, 639.

The inspection law of Oklahoma is a valid act and must be interpreted so as to give effect to its *intent*.

The clear intent of the legislature was to exclude the lighter and more dangerous illuminants, and to admit the heavier and safer ones, and the obscurity in the meaning of the act which the plaintiff contends for in his brief, arises from confusing actual specific gravity, with the inverse scale of the Baume hydrometer.

This was a rightful subject of legislation and the legislature had full authority to enact it as a police regulation, for the protection of the people. *Patterson* v. *Kentucky*, 97 U. S. 501; *Shellabarger* v. *Commissioners*, 50 Kansas, 141; 1 Kent's Com. 461; *Henderson* v. *Robinson*, 76 Iowa, 603; *State* v. *Hope*, 100 Missouri, 347; *Bush* v. *Indianapolis*, 120 Indiana, 476; *Bingham* v. *Burmingham*, 103 Missouri, 345.

The court's instructions on the question of damages were correct, and the amount of damages given by the verdict was not excessive. *Railroad Co.* v. *Spence*, 23 S. W. Rep. 211; *Railroad Co.* v. *Barron*, 5 Wall. 90; *Gas Co.* v. *Carter*, 65 Kansas, 569; *Ihl* v. *Forty-second St. Ry. Co.*, 47 N. Y. 317; *Morris* v. *Railroad Co.*, 71 N. Y. Supp. 321; *Austin Rapid Transit Co.* v. *Cullen*, 29 S. W. Rep. 256.

MR. JUSTICE WHITE delivered the opinion of the court.

Deselms sued the Waters-Pierce Oil Company to recover damages for the death of his wife and two young children, resulting from an alleged explosion of a highly inflammable and

explosive substance, consisting of a mixture of coal oil and gasoline. The mixture, it was alleged, had been bought by Deselms as coal oil from dealers who supposed it to be such, although their vendor, the oil company, knew the dangerous character of the article and yet had sold it as coal oil. The oil company answered by a general denial, and specially pleaded that if the accident in fact occurred it was caused by the negligence of Mrs. Deselms. Before trial Deselms dismissed the claim based upon the death of his wife. There was judgment on a verdict against the oil company for $14,500, which was affirmed by the Supreme Court of the Territory. 18 Oklahoma, 107.

On this writ the errors assigned, speaking in a general sense, complain of the action of the court below in affirming the trial court in giving, over exceptions of the oil company, certain instructions asked by Deselms, and in refusing to give various instructions asked by the oil company. For the purpose of clearness, however, we arrange the assignments under three headings: first, errors relating to the action of the trial court in giving and in refusing certain instructions; second, error in refusing at the close of all the evidence a request of the oil company for a peremptory instruction in its favor, on the ground that the proof as to negligence was not sufficient to justify submitting the case to the jury, and because, even if there was such proof, on the facts shown there was no legal right to recover; third, error in refusing a request concerning the method to be applied in fixing damages in the event the jury found for the plaintiff.

To dispose of these assignments it is necessary to take into view the law of the Territory relating to the inspection of coal oil, gasoline, etc., and the facts which the evidence tended to establish. Before coming, therefore, to directly consider the errors relied on we refer to these subjects.

In 1895 there was enacted in the Territory of Oklahoma a statute for the inspection "of coal oil, gasoline, or any other product of petroleum used as illuminating or burning fluids, by

whatever name known." The statute specially provided, however, that when once duly inspected in the Territory the fluids subject to inspection might be shipped to any portion of the Territory without additional inspection. See Laws, 1895, § 1, p. 174.

This act was amended in 1899. Session Laws, 1899, p. 186. Section 2 of the act amended § 8 of the prior act to read as follows:

"All illuminating fluids that flash under the conditions as prescribed in section one at a less temperature than 120 degrees Fahrenheit, and have not a specific gravity of not less than 46 degrees Baume, that is, all oils which fail to stand both tests, shall be branded by the inspector 'Rejected,' and all such oils that do not flash at a less temperature than 120 degrees Fahrenheit, and which have a specific gravity of not less than 46 degrees Baume, as determined above, shall be branded 'Approved Standard Oil.' "

By § 3 the flash test was not to be applied to gasoline or other inflammable fluids, but they were to be tested "to determine the weight or specific gravity in the same manner as required by § 1 of this act to oils." It was further provided in the section that "All gasoline to be used in vapor stoves and gasoline lamps shall have a specific gravity of not less than 70 degrees Baume, and (at) a temperature of 60 degrees Fahrenheit." It was made the duty of the inspector to brand all packages, boxes or barrels of gasoline or other fluid having no fire test with the words "Highly Inflammable," and the specific gravity found by him. Where the gasoline was found to have a specific gravity of not less than 70 degrees Baume, at a temperature of 60 degrees Fahrenheit, the inspector was required to mark the same "Approved Standard Gasoline." By § 4 the sale by any person of oil or gasoline as approved standard oil or approved standard gasoline, when in fact the same was not of that grade, as found by the inspector of oils, was declared to be a misdemeanor punishable by fine and imprisonment. Any company or corporation furnishing oils or gasoline for sale in the Terri-

tory of lower grades than that specified in the act was moreover made amenable to a fine.

The oil company had a wholesale depot at Guthrie, Oklahoma, for the sale of oil, gasoline, etc. At this depot there was a storage tank for coal oil, which in January, 1903, contained about 6,600 gallons of that fluid, which presumably had been inspected and tested according to law. Into this tank an employé of the company by mistake ran about 300 gallons of gasoline. When the mistake was discovered the agent of the oil company at Guthrie wrote to the manager at Dennison, Texas, informing him of the mistake. The manager replied, saying, "I cannot believe that this amount of gasoline will materially affect the burning quality of the P. W. Oil. At any rate, we will have to watch the matter, and take chances on selling all the P. W. Oil in P. W. Oil storage tank, trusting that the same will give good results." On receipt of these instructions the agent at Guthrie, without any renewed inspection of the oil in the tank containing the mixture of gasoline and coal oil, sold the same to merchants in his territory as coal oil. On January 28, 1903, three barrels of the mixture were so sold to Powers & Deselms, retail grocers at Orlando, Oklahoma. One of the barrels was sold by the firm to another merchant, and the two remaining barrels were taken to the store of the firm, and their contents placed in an empty tank used for that purpose. The barrels thus sold to Powers & Deselms bore no inspection brand, nor were the barrels inspected after they came into the possession of the firm. On the invoice, however, given to Powers & Deselms by the oil company, a charge for inspection fees was made, and Powers & Deselms had no knowledge of the real character of the material supplied as above stated. A few days after the sale to Powers & Deselms—on a Sunday morning—the plaintiff, Deselms, who was a clerk for the firm, bought one gallon of the mixture, supposing it to be coal oil, and took the same to his home in a two-gallon can. On the afternoon of the same day Deselms left Orlando for a brief absence. His wife and two children—one a boy of four, the

other a girl of two years—were left at home. The children were bright and active and were in perfect health. It had been arranged that Mrs. Emory, a sister of Deselms, would remain at night with the family.

The dwelling was a one-story wooden structure, weatherboarded on the outside and lathed on the inside, the laths being covered with canvas, and the canvas then being papered over. The house had a frontage of twelve feet, ran lengthwise east and west about twenty-four feet, and was divided into two rooms. The east room was used as a kitchen, the cooking stove being near the east wall. The west room was the general living and sleeping room. In it was a heating stove composed of a cylindrical fire-box and a cylindrical plate or body with a door in the side. This stove stood on the east side of the room and it and the kitchen stove were connected with a brick flue in the partition wall between the two rooms.

The first use made of the gallon of oil bought by Deselms was on Tuesday evening, when Mrs. Emory filled a new lamp from the contents of the can, and then lit the lamp. Almost immediately flame shot out of the chimney. Mrs. Emory extinguished the light, trimmed the wick and lit the lamp again, and upon flame again issuing out of the chimney, thinking that the lamp was defective, she extinguished the light and made no further attempt to use the lamp. The oil can was then placed in the kitchen near the southwest corner of the room. During the evening a wood fire which had been burning in the heating stove burned out. The next morning, after lighting the kitchen fire, Mrs. Emory started to kindle a fire in the heating stove. She shook down the ashes, examined the contents of the ash pan and found that the stove was cold. She ceased her preparations to start a fire, however, on being asked to assist in dressing the children, Mrs. Deselms saying that she would make a fire in the stove later. There was no fire in the stove when Mrs. Emory left the house at about 8 o'clock on that (Wednesday) morning, and she was the last person to see alive Mrs. Deselms and the two children.

We take from the opinion of the Supreme Court of Oklahoma a summary of the evidence relative to the subsequent destruction of the house by fire and the death of the wife and her two children:

"The plaintiff's house was discovered to be on fire at about ten o'clock in the forenoon, and upon the arrival of the first person on the scene it was so completely ablaze that it was impossible, on account of smoke and gases, to force an entrance into the building. About nine o'clock in the morning it had blown up cold from the northwest, and there was a high wind blowing from that direction at the time the fire occurred. Mr. Bradshaw was the first person to arrive at the building, and he broke in the back or kitchen door and tried to get into the other room, but was choked down by the dense smoke and gas, and came out. He tried a second time to enter the house, and was again choked and smothered by the smoke and gas, and had to retreat. He then ran around the house and tried to get in otherwise. About this time others came, and they broke in the north wall and found the plaintiff's son lying face downward on the bed near the northwest corner of the house, badly burned and life extinct, probably from suffocation. As the smoke cleared somewhat from the room they could see the body of the plaintiff's wife lying on the floor and what remained of the little girl on a couch. By pushing the building partly over, the charred bodies were taken out before the fire had completely burned out.

"After the fire and after the remains of the building had fallen in and been pushed aside and the fire partly extinguished, the heating stove was found inclined to the northwest, the floor being partly burned out beneath it; the top was off the stove and the upper hinge to the door broken, the door hanging by the lower hinge. There was paper, kindling and wood in the stove just a little charred. The plaintiff's wife was lying with her feet near the stove, her head away from it in a westerly direction in front of the stove door. Near her body was found the top or conical part of the oil can, the body of the can being

found four to seven feet away in a southwesterly direction. These were the conditions existing at the time the fire was subdued sufficiently to admit of examination by those present."

The morning after the fire about a dozen pint bottles were filled from the mixture remaining in the tank at the store of Powers & Deselms. After being corked and sealed with plaster of paris the bottles were placed on shelves in a drug store at Orlando, the shelves being located fifteen to eighteen feet from a stove standing in the middle of the room, the temperature of the room being about 75 degrees. In about twenty minutes one of the bottles exploded, and the remainder were taken into the cellar. Subsequently the fluid in two of the bottles was tested and analyzed by George L. Holter, an expert chemist, who was then and for thirteen years had been professor of chemistry and metallurgy in the Agricultural College at Stillwater, Oklahoma. Testifying as to the analysis he had made, Professor Holter said he found by the use of a closed-cup tester that the material would flash at 60, which would indicate a flashing point of not more than 80 degrees in the open-cup test required by the statute. The witness made a "fractional distillation" of the fluid to ascertain if it had any light material in it to account for the low-flash test, and produced a distillate of practically 5 per cent of the original quantity, which, judging from the general appearances, smell and flash point, the witness said, was "what we generally term naphtha or gasoline." The flash point of this distillate was 37 degrees, while the flash point of the residue of the material from which the distillate had been taken was 95 degrees, which, allowing for a full 25 degrees of difference between the closed and open cup-test methods, would bring the flash point at about 120 degrees, according to the statutory method. The witness swore that the mixture of coal oil and gasoline at the ratio of 95 and 5 per cent, would be dangerous to use as coal oil. He, moreover, testified that ordinarily an explosion of three-fourths of a gallon of a mixture of coal oil and gasoline, such as had been examined, would generate a volume of gas fifteen hundred to eighteen hundred times

that of the liquid. Further, the witness declared that while it would not be dangerous to use coal oil having a flash test of 120 degrees to start a fire, it would be dangerous to use the analyzed mixture for that purpose.

In the light of the foregoing we come to consider the assignments of error.

1. *The error alleged to have been committed by the trial court in giving to the jury, at the request of Deselms, four instructions, numbered 4, 5, 6 and 7, and the refusal to give two instructions, numbered 5 and 11, requested by the oil company.*

Instruction numbered 4 called the attention of the jury to the character and quality of the oils and gasolines which the statute of the Territory permitted to be sold, referred to the tests prescribed for ascertaining their quality, and pointed out that it was a criminal offense to sell products of petroleum which did not conform to the statutory standard. It is said that this instruction was based mainly upon the provisions of § 2 of the act of 1899, heretofore quoted, which section, it is insisted, is void, and therefore afforded no proper basis for consideration by the jury in determining whether the oil company had been negligent in putting the fluid in question upon the market. This rests upon the contention that the text of the statute is in effect meaningless, and that besides, even if it could be enforced according to its letter, the statute would lead to such an absurd result as would operate to destroy the very purposes which it was designed to accomplish. We think the contentions are without merit. As we have seen, the requirement of the statute as to specific gravity is that the oil shall "have not a specific gravity of not less than 46 degrees Baume." While the two negatives may apparently render the clause on its face confusing, if the superfluous negative be omitted all difficulty on this subject is removed, and the sentence would therefore provide that the oil must have a specific gravity of not less than 46 degrees Baume. This provision obviously exacts that the gravity of the oil shall be ascertained by the use of a Baume hydrometer, and it is the method of reading the scale of that instru-

ment upon which is based the argument that, even with the superfluous negative omitted, the provision of the statute leads to an absurd result and gives sanction to the admission of dangerous while excluding safe oils. In ascertaining the specific gravity by the Baume scale the heavier the oil tested the lower will be the number indicated on the scale, and consequently the higher the number on the scale the lighter or more volatile will be the oil tested. This results because the Baume scale is to be inversely read. Now as the statute, omitting the superfluous negative, reads that the oil shall have a specific gravity of not less than 46 degrees Baume, the contention is that the statute excludes all oils lower than 46 degrees and permits all oils above 46 degrees to be sold as not dangerous. But we think when the context of the statute is considered and its provisions as to gasoline and the other light and highly inflammable fluids are taken into view, it becomes quite clear that while the words of the statute are somewhat confusedly expressed, arising from the fact the Baume scale is inversely read, that the plain purpose of the statute was to permit the use of oils which, when tested by the Baume hydrometer, indicated at least 46 degrees specific gravity, and to exclude all oils of a lighter character, that is, all oils which, when tested by the hydrometer, indicated a degree of gravity on the scale higher than 46. In other words, we think that when the provision of the statute is taken into view in connection with the inverse scale of the Baume hydrometer the requirement that the oil shall have a specific gravity of not less than 46 degrees Baume in effect was intended to exact that the coal oil permitted to be sold as not dangerous should be of no less gravity than 46, and therefore when tested should indicate not more than 46 degrees on the Baume scale.

Relying upon testimony which was offered tending to show that from some localities oils which are perfectly safe are obtained, although they have a specific gravity somewhat above 46 Baume, it is insisted that the law in question was not a legitimate exercise of the police power, since by selecting 46 degrees Baume as the standard, oils are excluded which would

be as safe for use as oil complying with the standard fixed by the statute. But we think the court below was clearly right in deciding that, as the subject was within the police power of the State, it was not within the province of the judiciary to disregard the statute and treat it as void upon the theory that the legislature had acted unwisely in fixing the standard which the statute prescribed.

It is further contended that § 4 of the act of 1899 was void because of the alleged unequal punishment therein provided for persons and corporations performing the same act. But whether or not the section is subject to the criticism made against it, it is clearly separable from the rest of the act, as held by the court below, and in no wise affected the unlawful use within the Territory of oil which did not conform to the standard fixed by the statute.

The other instructions, Nos. 5, 6 and 7, which the assignment of errors assail, in various forms of statement submitted to the jury the following subjects: *a*, The liability of the oil company predicated upon the fact that the mixture in question was dangerous to be used for the usual and ordinary purposes for which coal oil is generally used; *b*, that it was knowingly sold by the oil company to be resold as coal oil; *c*, that the making use of coal oil to kindle or start fires was a general and universal custom or usage, and hence the oil company had reason to believe that the mixture so sold by it would be used for such a purpose; and, *d*, that the accident happened while the fluid was being used with ordinary care and caution, in the belief that it was coal oil, and for a purpose for which coal oil is usually intended and used.

In this connection it is to be observed that at the trial Deselms, the plaintiff, offered evidence tending to show that there was a general custom to make use of coal oil for kindling fires, but on the objection of the oil company the offered testimony was excluded, the court declaring it was of opinion that whether coal oil was generally used for the purpose claimed the subject was one of common knowledge and experience in the com-

munity, and it was not necessary to offer proof in relation thereto, and, as shown by the instructions complained of, the determination of the existence of the custom or usage was subsequently left to the jury. In affirming the action of the trial court on this branch of the case the Supreme Court of the Territory held that the trial court had not erred in excluding the testimony as to the custom or usage in question, and that no prejudicial error had been occasioned by submitting the determination of the question to the jury, since the custom in the community was so universal that the court would have been authorized to have instructed the jury accordingly. In judicially noticing the existence of a usage or custom among persons generally within the Territory to use coal oil in kindling fires, we cannot say the court below erred, and, upon the hypothesis indulged, no error was committed in overruling the exceptions to the instructions. See *Ellis* v. *Republic Oil Co.*, 133 Iowa, 11.

We deem it unnecessary to particularly refer to the assignments of error relating to the refusal of the trial court to give to the jury certain instructions submitted on the part of the oil company, as the proposed instructions but embodied the converse of the propositions contained in instructions Nos. 5, 6 and 7, just disposed of. One of the instructions, however, was framed upon the theory that the case was controlled by the act of 1895, providing for the inspection of oils, etc., because of the alleged void character of the act of 1899, a contention which we have also previously adversely disposed of in considering that subject.

2. *The error alleged to have been committed by the appellate court in holding that the trial court rightly refused at the close of the evidence to give a peremptory instruction to the oil company.*

The errors assigned on this subject, as we have seen, are twofold, that is, the inadequacy of the facts to show that the accident was caused by the inflammable nature of the mixture and the absence of a legal right to recover, even if the proof

justified submitting the question of fact to the jury. Concerning the first, the contention is that as the plaintiff was bound to make out his case by a preponderance of evidence, and as there were no facts in evidence from which an inference could properly be drawn that the accident might not have resulted if there had been no admixture of gasoline with the coal oil, or which authorized the inference that the loss was not caused solely by the negligence of the wife of the plaintiff, the peremptory instruction should have been given.

It is, of course, to be conceded that the burden of proof was primarily upon the plaintiff to establish the negligence charged, and it was not enough to show an accident and an injury. *Patton* v. *Texas &c. Ry. Co.*, 179 U. S. 658. We are, however, of the opinion that the court below was clearly right in deciding that the trial court had committed no error in ruling that the evidence was sufficient to require the submission of the case to the jury on the question of the cause of the accident. The highly inflammable character of the mixture was well illustrated by the testimony of Mrs. Emory, a sister of the plaintiff, that on filling a new lamp with the mixture and lighting it flame shot out of the lamp chimney. Undoubtedly the evidence directly pointed to the fact that the can which contained the fluid had been taken from the east room, where it usually was kept, to the room in which stood the heating stove. Clearly, also, the proof as to the unburned and charred or stained condition of the kindling wood in the heating stove, when connected with the removal of the can, tended to show that some of the fluid from the can had been applied to the kindling before it was ignited and preparatory to starting a fire. But the situation of the can after the fire and the place where the top of the can was found, clearly tended to rebut the implication that the fire had been lighted and fluid from the can then poured upon it. In view of the finding of the jury, as to the custom to use coal oil for kindling fires, and the knowledge which the oil company must be presumed to have had, that the fluid sold by it as coal oil would be used for this purpose, the mere inference

that the oil from the can had been applied to the kindling before it was lighted afforded no ground for taking the case from the jury. Moreover, in view of the proof as to the condition of the kindling wood, of the situation of the can, of the condition of the stove after the fire, of the position of the bodies of the wife and the two children, and of the dense and large volume of gases which filled the premises at the outbreak of the fire, we think there was adequate proof from which the jury could have inferred that the accident was the result of an explosion caused by applying a light to the kindling wood in the stove after it had been saturated with fluid taken from the can, an accident therefore resulting solely from the wrong of the oil company in selling as coal oil a highly dangerous and inflammable mixture, unsafe to be used for the purpose for which, under the instruction of the court and the findings of the jury, coal oil was ordinarily used. It is unnecessary to further elaborate the subject because of the very full and accurate review of the tendencies of the proof in relation to the matter made by the court below in its opinion.

The contention that, although there was sufficient evidence to go to the jury as to the fact of negligence on the part of the oil company, nevertheless there was nothing in the tendencies of the proof to support the conclusion that the oil company was legally responsible for the accident rests on the proposition that as Deselms bought the oil, not from the oil company, but from the firm of Powers & Deselms, and therefore was only a remote vendee, there was no legal liability on the part of the oil company. This is based upon the propositions that there was between the plaintiff Deselms and the oil company, no contractual relation, and besides in any event the act of the oil company in selling the dangerous mixture to Powers & Deselms was not the proximate cause of the accident. As we have seen, however, there was evidence tending to prove, and under the instructions given to the jury their verdict must be taken as establishing the following facts: 1, that the oil company knowingly sold to Powers & Deselms a highly inflammable mixture of coal oil and

gasoline in violation of the territorial statute, and that the oil company knew, or had reason to assume, that the mixture so sold would be retailed by its vendees (Powers & Deselms) to the public generally for domestic use as coal oil; 2, that Powers & Deselms purchased the mixture in question supposing it to be coal oil, and that the plaintiff, Deselms, bought the mixture from the firm in like ignorance of its real character; 3, that there was a general custom in the community to use coal oil for kindling fires, a use which would not have subjected persons so using it and exercising ordinary care to the appalling danger which would arise from the making use of the inflammable and dangerous mixture composed of gasoline and coal oil, a custom of which the oil company had knowledge or of the existence of which it is presumably charged with knowing. From these facts it is apparent that the responsibility of the oil company rested not on contract but in tort, and therefore the contention as to want of contractual relation is wholly irrelevant.

In *Savings Bank* v. *Ward*, 100 U. S. 195, relied upon by the oil company, it is true an attorney at law was held not to be liable to a third party for the negligent performance of a contract to examine the title to certain real estate, because of the absence of a contractual relation. But the distinction between the principle which was there controlling and the one which is here applicable was pointed out in the opinion of the court in that case, where it was said (p. 204):

"Pharmacists or apothecaries who compound or sell medicines, if they carelessly label a poison as a harmless medicine, and send it so labelled into the market, are liable to all persons who, without fault on their part, are injured by using it as such medicine, in consequence of the false label; the rule being that the liability in such a case arises, not out of any contract or direct privity between the wrongdoer and the person injured, but out of the duty which the law imposes on him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with the label may have passed through many intermediate sales before it reached the

hands of the person injured. *Thomas* v. *Winchester*, 2 Seld. 397, 410."

And the same principle was applied to a sale of dangerous oil in *Wellington* v. *Downer Kerosene Oil Co.*, 104 Massachusetts, 64, where it was said: "It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for an injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other, who is not himself in fault." And the like doctrine has been expounded in many cases. See, especially, *Elkins* v. *McKean*, 79 Pa. St. 493, and *Weiser* v. *Holzman*, 33 Washington, 87, where the doctrine is clearly and forcibly stated and the many authorities sustaining the same are cited. In view of the tendencies of the proof as to the entire absence of knowledge by Powers & Deselms, when purchasing from the oil company, and the ignorance of Deselms when he bought from the firm, of the character of the fluid, it is certain that in the case before us the act of the oil company, in any view, was the proximate cause of the accident, as no other independent and efficient cause or wrong can be legally said to have occasioned the same. *The G. R. Booth*, 171 U. S. 450.

But because we confine ourselves to the particular facts of the case before us we must not be understood as holding, in view of the dangerous character of the fluid and the putting of the same upon the market by the oil company, with the expectation that it would be retailed to the public, and the violation of the statutory regulations and prohibition concerning the sale of such article, that under the general principles of law sustained by the authorities already cited, a recovery against the oil company might not have been justified, even if the proof had established that Powers & Deselms had been informed by the oil company of the dangerous character of the mixture. See, further, *Clement* v. *Crosby*, 148 Michigan, 293, and *Stowell* v. *Standard Oil Co.*, 139 Michigan, 18, and authorities cited in both cases.

3. *It remains only to consider error alleged to have resulted from the affirmance of the refusal of the trial court to give a particular instruction asked by the oil company concerning the subject of damages.*

In its general charge the court in substance instructed the jury that the measure of damages was the net value to the father of the services of his children during their minority. Thus the court said:

"Damages are intended to be compensatory and must be fair, reasonable and just. The father is entitled to the services of his son until he arrives at the age of twenty-one years, and of the daughter until she arrives at the age of eighteen; he is also charged with the expense of their support, maintenance, education and social training, and you must fix the amount which, in your judgment, will compensate him for any pecuniary loss he may have sustained."

And, later, the jury were cautioned that their verdict "must be based upon the evidence which the court has permitted to go to you."

On behalf of the oil company the trial judge was asked to give an instruction numbered 14, as follows:

"In determining the amount of your verdict for the plaintiff, if you find for such plaintiff, you should not take into consideration the pain suffered by the deceased or the wounded feelings of the father or other surviving relatives, but your verdict must be limited to such amount, if any, as you believe the plaintiff has suffered financially by reason of the death of his children. In other words, the recovery, if any, is to be a pecuniary compensation for a pecuniary loss, and such finding of loss must be based upon the evidence introduced in the case."

The court gave this instruction, with the addition at the end thereof of the following sentence: "The amount of damages cannot be fixed by the evidence, but must be the result of your own judgments."

We shall consider the exception in the light of the objections urged in the brief of counsel. In discussing the subject of ex-

cessive damages counsel for the oil company thus treat of the modification of instruction No. 14:

"We submit, in the first instance, that it was error on the part of the court to tell the jury that the question of damages cannot be fixed by the evidence, but must be the result of your own judgment. While it is true that the amount of damages cannot be named or ascertained from specific evidence disclosing the amount of loss on the part of plaintiff, yet they must bear a relation to the evidence, and the vice of this instruction is that it cuts loose the minds of the jury from all regard to the evidence, and it is needless to say that they went the instant they were turned loose. The authorities cited later will fully cover this point in this instruction."

The authorities referred to are decisions of state courts of last resort dealing with the subject of excessive damages when allowed by juries for the negligent causing of the deaths of minors. They more particularly concern the duty of a court to grant or refuse a new trial where the damages are excessive, and where the action of the trial court in refusing a new trial was open to review in the appellate court. As it is clear that this court does not possess such a power (*City of Lincoln* v. *Power*, 151 U. S. 436; *Ward* v. *Joslin*, 186 U. S. 142, 153), we need not further notice the authorities relied upon.

That the correctness of the general instruction as to what were the elements of damage sustained by the father was not assailed by the oil company sufficiently appears from the argument of counsel above excerpted, which also evidences the fact that no question was intended to be made as to the non-production at the trial of witnesses to give evidence in respect to the net value of the prospective services of the children. Manifestly, the rule deemed by the court and counsel to be applicable, to quote language contained in the opinion in *Brunswig* v. *White*, 70 Texas, 504, was that "when from the age or undeveloped state of the child any estimate of value of the services until majority would be matter of opinion, in which no particular or especial knowledge in way of expert testi-

mony could be procured better than the judgment and common sense of the ordinary juror called to the duty of determining such value—then, upon such testimony, the sound discretion of the jury can be relied on to determine the value, without any witness naming a sum." And see *Balto. & Ohio S. W. Ry. Co.* v. *Then*, 159 Illinois, 535, and *Birkett* v. *Knickerbocker Ice Co.*, 110 N. Y. 504.

The complaint that error was committed in the modification made of requested instruction No. 14, as stated by counsel, amounts therefore but to the assertion that thereby the jury were informed that they possessed power to capriciously fix the amount of damages. We are unable, however, to so interpret the language, especially when read in connection with the prior instructions of the court. The jury were not told that the "question" of damages could not be fixed by the evidence, but that the "amount" thereof had not been fixed. When they were further instructed that the amount of damages must be "the result of your own judgments," we think, in reason, the jury could only have understood that it was left to their sound sense and deliberate judgment to determine the amount of damage, from a consideration of the various elements entering into the damage, and the factors in evidence, viz., the age, health, condition in life of the children, etc. If counsel were of opinion that the modification as expressed was susceptible of being misunderstood by the jury, the court should have been asked to remove the supposed ambiguity.

Finding none of the assignments of error relied upon and which we have power to review to be well founded, it results that the judgment of the Supreme Court of the Territory of Oklahoma must be and it is

Affirmed.